

Modern Practice in the Indian Courts

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I. INTRODUCTION

The recent decision of the United States Supreme Court in *National Farmers Union Insurance Company v. Crow Tribe of Indians*.¹ has the potential for significantly changing the practice of law on and near the approximately one hundred and fifty Indian reservations served by Indian courts. Rejecting arguments that Indian courts are generally prohibited by federal law from exercising jurisdiction in civil matters involving non-Indians, the Court in *National Farmers Union Insurance* unanimously held that Indian courts are, in the first instance, the exclusive forums for determining their own jurisdiction.

As a result, more suits involving Indian and non-Indian parties will be brought in the Indian courts when some of the incidents giving rise to the suit take place on the reservation. Even the lawyer who does not represent Indians has a substantially increased likelihood of being required to appear in an Indian court when clients have business dealings with one of the many hundreds of tribal governments, agencies, and enterprises; own property or a business on a reservation; marry into a family of Indian heritage; are involved in the welfare or adoption of children; engage in commercial relationships with individual Indians; or do business with companies belonging to individual Indians.

In many instances, the jurisdiction of the Indian court over issues arising on the reservation is exclusive.² The lawyer who

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1. 471 U.S. 845 (1985). See also *Iowa Mutual Insurance Co. v. La Plante*, 107 S.Ct. 971 (1987) (amplifying and strengthening *National Farmers Union*).

2. See *Fisher v. District Court*, 424 U.S. 382 (1976) (tribal court jurisdiction is exclusive to determine custody of Indian child domiciled in reservation); accord *Williams v. Lee*, 359 U.S. 217 (1959) (tribal court jurisdiction is exclusive when suit is brought against Indians for activities occurring on reservation); see generally Milbank

practices in a state where tribal Indians are located should therefore have some familiarity with the local Indian courts, their jurisdiction, and sources of law that are being applied in them.

This article is intended to provide those affected by the decision a basic understanding of Indian court jurisdiction and practice. Part II discusses, in more detail, the *National Farmers* holding. Part III is an overview of the history, structure, and types of Indian courts. Part IV deals with the complexities of jurisdiction, and Part V, constitutional and civil rights issues in Indian courts. Part VI summarizes the basics of Indian court practice and procedure.

II. *NATIONAL FARMERS UNION INSURANCE CO. v. CROW TRIBE*

In *National Farmers Union Insurance*, the action arose when a Crow Indian was injured on land belonging to a state school district within the Crow Reservation. The plaintiff filed a tort action against the school district in the Crow Tribal Court and personally served the chairman of the school board. The chairman ignored the complaint and sent it to the school district's insurer only after the tribal court had entered a default judgment against the district.

The insurer, National Farmers, obtained a permanent injunction against the tribal court proceeding from the Federal District Court in Montana. The district court held that the Crow Tribal Court lacked subject matter jurisdiction over the tort that was the basis for the default judgment.³ Without reaching the merits of the question of tribal court jurisdiction, the Ninth Circuit Court of Appeals, reversed on the ground that the district court lacked jurisdiction to adjudicate the questions raised by the insurer.⁴ In essence, the court of appeals held that Congress, by enacting the Indian Civil Rights Act,⁵ had limited federal court review of tribal court proceedings to hearings on writs of habeas corpus. The appellate panel concluded that a district court had no jurisdiction to entertain

Mutual. Ins. Co. v. Eagleman, — Mont. —, 705 P.2d 1117, 12 Indian L. Rptr. 5106 (1985).

3. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 560 F. Supp. 213 (D. Mont. 1983).

4. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 736 F.2d 1320 (9th Cir. 1984).

5. 25 U.S.C. §§ 1301-41 (1968).

a claim that a tribal court had acted beyond the limits of its jurisdiction.

The Supreme Court reversed on the central issue of federal jurisdiction, finding that a claim of abuse of tribal jurisdiction raises a question "that must be answered by reference to federal law and is a federal question under section 1331."⁶ In its conclusion, the Court pointed out that while Indian tribes exercise a separate sovereignty rooted in their precolumbian existence as Indian nations, the present scope of tribal sovereignty is generally controlled and limited by federal law.⁷

National Farmers Union answered two more questions important to the jurisdiction and effectiveness of Indian courts. The insurer had contended that under the rule in *Oliphant v. Suquamish Tribe*,⁸ in which the Supreme Court held that tribes had lost the power to prosecute non-Indians for criminal offenses in their courts, the tribal court was absolutely barred from exercising jurisdiction over the "non-Indian" state school board. Noting, however, that the authorities on which the *Oliphant* Court had relied contained language affirming the legitimacy of tribal civil jurisdiction, the *National Farmers Union* Court stated:

[W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians is not automatically foreclosed, as an extension of *Oliphant* would require.⁹

The Court directed that each assertion of tribal civil jurisdiction be reviewed in the first instance by the Indian Court itself to determine whether such jurisdiction had been altered, divested, or diminished by any one of a number of factors.¹⁰

Finally, the Court decided that based on the federal policy of tribal self-government and self-determination, examination of a tribe's civil jurisdiction should first be conducted by the tribal court:

[T]he orderly administration of justice in the federal

6. *Nat'l Farmers*, 471 U.S. at 852.

7. *Id.*

8. 435 U.S. 191 (1978).

9. *Nat'l Farmers*, 471 U.S. at 852.

10. The Supreme Court directed the Indian courts to carefully examine tribal sovereignty, the extent to which that sovereignty had been altered, relevant statutes, executive branch policy, treaties, administrative and judicial decisions in deciding questions involving their own jurisdiction. *Id.* at 855.

court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of . . . "procedural nightmare" . . . will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made.¹¹

Thus, the federal courts are instructed to allow Indian courts to proceed through jurisdictional hearings, trial, and the tribal appeals process prior to any exercise of federal question jurisdiction to review the validity of tribal jurisdiction.¹²

National Farmers Insurance concludes a decade of extensive litigation, legislative action, and academic commentary regarding the jurisdiction of Indian courts.¹³ The central issue upon which much of this activity has been focused is tribal jurisdiction over non-Indians and their property within Indian reservations.¹⁴ In the great majority of cases where federal courts have considered this issue, tribal court jurisdiction has

11. *Id.* A federal court need not allow the Indian court to proceed where assertions of tribal court jurisdiction are being used to harass a party, are made in bad faith, are patently violative of express jurisdictional prohibitions, or where a party lacks an adequate opportunity to challenge the tribal court's jurisdiction. *Id.* at 856 n.21; see also *Sanders v. Robinson*, 772 F. Supp. 913, 13 Indian L. Rptr. 3135 (D. Mont. 1985) (non-Indian defendant in tribal court proceeding may not successfully obtain federal court jurisdiction simply by alleging that assertion of tribal jurisdiction over him is per se harassment and beyond the jurisdiction of the tribal court).

12. Several Indian Courts have had occasion to review the scope of their own jurisdiction. On remand to the Crow Tribal Court, an appellate panel held that the tribal court has jurisdiction to adjudicate a controversy between an Indian and a "non-Indian" state school district since the actions complained of affect the health, welfare, and economic interests of the Crow tribe, and also due to consensual relationships entered into by the tribe and the school district. *Crow Tribe Sage v. Lodge Grass School Dist.*, 13 Indian L. Rptr. 6035, 6041 (Crow Tribal Ct. App. 1986). See also *Deal v. Blatchford*, 3 Navajo Rptr. 159 (1982) (Navajo courts may exercise jurisdiction over actions involving torts committed by non-Indians against Indians); *Hubbard v. Chinle School Dist.*, 3 Navajo Rptr. 167 (1982) (jurisdiction of Navajo courts in suit by Indians against state school district); *Accord Tracy v. Yazzie*, No. WR-CV- 313-85 (D. Window Rock, Sept. 16, 1986) (eleventh amendment to U.S. Constitution does not bar suit in tribal court against state employees); *Sandoval v. Tinian, Inc.*, 13 Indian L. Rptr. 6041, 6092, D. Crownpoint 1986) (tribal court had jurisdiction over non-Indian defendant when party to contractual relationship inside Indian country); *Rosebud Housing Authority v. La Creek Electric Cooperative*, 13 Indian L. Rptr. 6030, 6031 (Rosebud Sioux Tribal Ct. 1986) (tribal court has both personal and subject matter jurisdiction over electrical cooperative operating on reservation); *Hopi Tribe v. Lonewolf Scott, et. al.*, 14 Indian L. Rptr. 6001 (Hopi Tribal Ct. 1986) (tribal court has criminal jurisdiction over non-member Indians committing offenses within the reservation).

13. See *infra* notes 15, 16, 20, 46, 97, 104, 146, 183 and accompanying text.

14. See *infra* note 88.

been upheld. Generally, the federal courts have decided that the civil jurisdiction of Indian tribes and their courts depends on factors other than the Indian status of the parties. The legal and political history of the tribe whose jurisdiction is being reviewed is important in defining the scope of that jurisdiction.

III. BACKGROUND

A. Historic and Legal Roots of the Indian Courts

Most of the Indian courts operating today are located in western states, but Indian jurisdictions exist in all parts of the country from Maine to Florida, California to Alaska. The origins of these Indian courts are diverse and systems of justice created by Indian people prior to contact with Europeans¹⁵ still influence practice on some reservations. Many contemporary Indian courts, such as the traditional, religious courts of some of the Pueblos, the courts of the Five Civilized Tribes, and the river courts of Pacific Coast fishing tribes have their origins in the Indian society which they serve. The majority of existing Indian courts are, however, based on the Bureau of Indian Affairs forums established by reservation superintendents in the nineteenth and early twentieth centuries.¹⁶

The historic recognition of the Indian nations as sovereigns separate and apart from the state and federal governments,¹⁷ combined with the growth of tribal institutions away from the tutelage of the federal trustee, have led to the birth of the modern Indian court system. Contemporary Indian courts strive to preserve tradition and custom while applying modern policies developed to support the tribe's role as a modern government.¹⁸

15. L. FRENCH, INDIANS AND CRIMINAL JUSTICE 1-20 (1982).

16. See W. HAGAN, INDIAN POLICE AND JUDGES (1966); see also V. DELORIA, JR. & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983).

17. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (United States and Navajo Nation are separate sovereigns and prosecution of Navajo Indian by both for same offense does not violate defendants' right to be free of double jeopardy); see also *Powers of Indian Tribes*, 55 Interior Dec. 14 (1934).

18. *Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rptr. 6008, 6009 (Intertribal Ct. App. 1984) (historically, tribe exercised criminal jurisdiction over non-member Indians; modern law enforcement problems and close cultural and social ties between modern Sioux tribes requires that tribe continue to maintain criminal jurisdiction over non-member Indians).

B. Organization of Modern Indian Courts

The flagship tribal judicial system, pre-eminent because of its size, is that of the Navajo Nation. With several divisions and a fully staffed Supreme Court, the Navajo Tribal Courts process over 45,000 cases per year.¹⁹ In contrast, some tribal jurisdictions are part-time operations with a docket of no more than 100 cases per year. A recent development in the Indian judiciary is the establishment of inter-tribal systems designed to efficiently serve several reservations.²⁰ Indian courts serving more than one tribe now operate in western Washington, Oklahoma, and on some of the Sioux Reservations. These systems provide some trial services and require that each participating tribe submit its appellate matters to an inter-tribal appellate forum.

Of the more than 1000 people now working in the Indian courts, an overwhelming number are Indians. In the past decade tribal councils have moved away from the practice of appointing local, non-Indian lawyers to tribal judgeships. The prevalence of Indians on the tribal bench is partially due to the availability of legally trained Indians has increased substantially in recent years.²¹ The efforts of the American Indian Lawyer Training Program, of Oakland, California; the Indian Law Center at the University of New Mexico; and the federal Legal Services Corporation, which provides legal aid services to Indians on many reservations have resulted in a rapid increase in the sophistication of the Indian Courts. Most tribal judges now have some college training and many have law degrees and are members of state and tribal bar associations.²²

After appointment to the bench, Indian judges receive extensive legal education services from the National American

19. In fiscal year 1985, the Navajo Courts processed 21,823 criminal, 20,007 traffic, 2,168 civil, 31 appellate, and 2,182 juvenile cases for a total of 46,129 cases. Statistical Report of the Navajo Courts (1985). Bureau of Indian Affairs statistics indicate that approximately 185,000 cases were filed in all Indian courts during Fiscal Year 1985.

20. See "The Northwest Intertribal Court System," 1 Tribal Ct. Rptr. B-67 (1979).

21. In 1960, the number of Native American law school graduates active in the United States was 44. In 1970, the number had risen to 288 and by 1980, to 999. Statistics derived from U.S. Bureau of Census data by the American Bar Association and Professor Leonard Rabinowitz of Northwestern University School of Law (on file with author).

22. Letter of March 10, 1987, from Roland Johnson, Chief, Division of Tribal Government Services, U.S. Bureau of Indian Affairs (on file with author) (BIA provides training to 600 judges and court personnel); 25 U.S.C. § 1311 (3) and (4) (Indian Civil Rights Act requires legal training for judges and court personnel).

Indian Court Judges Association.²³ The Judges Association has been providing training for judges and staff, bench books, and manuals for almost twenty years.²⁴ Through the National Indian Justice Center at Petaluma, California, the Judges Association provides regional training sessions for judges and court personnel on a broad range of topics.²⁵ A certification program for tribal judges and a standardized system for court management is also being developed.

C. *Types of Indian Courts*

Most Indian courts now in operation are "tribal courts."²⁶ The majority of their powers are derived from the sovereignty of the tribes. Tribal courts may be established by a provision in the tribal constitution but are more often organized by an act of the tribal legislature incorporated into the tribal code. Their codes and procedural rules are adopted by the tribal legislature. The law of the United States has long recognized that tribes have the inherent sovereign authority to organize courts.²⁷ Tribal sovereign authority can, however, be limited or removed by Congress.²⁸

The second type of Indian court, called a "Court of Indian Offenses," is set up and maintained by the Secretary of the Interior,²⁹ to provide law and justice on the reservation. The extent to which the Courts of Indian Offenses are to be considered federal instrumentalities is an open question.³⁰

23. Various publications of the National Indian Justice Center, located at Number 7, 4th Street, Petaluma, California 94952.

24. *Id.*

25. *Id.*

26. According to Bureau of Indian Affairs statistics, 127 tribal courts and 19 Courts of Indian Offenses are now in operation. Budget Proposal, United States Bureau of Indian Affairs, at 77 (Fiscal Year 1986).

27. *Deal v. Blatchford*, 3 Navajo Rptr. at 160 (tribal court exercises inherent jurisdiction of the tribe subject to control of the tribal legislature).

28. *Muskogee (Creek) Nation v. Bureau of Indian Affairs*, 13 Interior Bd. Indian App. 211, 213-14, 92 Interior Dec. 309, 314 (1985) (the general civil and criminal judicial authority of the Muskogee (Creek) Nation abolished by Congress).

29. *United States v. Clapox*, 35 F. 575 (D. Or. 1888) (the President of the United States, acting through the Secretary of the Interior, has the general power under the federal statutes to establish Courts of Indian Offenses and provide for their jurisdiction).

30. *United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978). *But see Begay v. Miller*, 70 Ariz. 380, 385-86, 222 P.2d 624, 628 (1950) (Navajo court is not a federal court when exercising tribal domestic relations jurisdiction); *see also* Memorandum from the Deputy Assistant Secretary of the United States Dep't of the Interior - Indian Affairs (Nov. 12, 1985) (C.F.R. courts are federal agencies) [on file with the author].

Courts of Indian Offenses are often called "CFR" courts³¹ because the code which they enforce is located in Part 11 of the Code of Federal Regulations. A substantial revision of Part 11 of the Code is now being circulated in draft.³² The revision, for the first time, contains a children's code, a probate code, and a domestic relations code. The revision also provides for the application of the Federal Rules of Civil Procedure to proceedings in the CFR courts.³³ The adoption of a tribal code by the tribal legislature causes the abolition of most of the applicable provisions of the CFR,³⁴ but the adoption of a tribal code does not necessarily result in the dissolution of the CFR court in favor of a tribal court. Thus, a CFR court may operate under a tribal code or enforce Part 11 as a criminal code and utilize tribal ordinances as civil and regulatory law.

D. Law Applied in the Indian Courts

The existing provisions of Part 11 of the CFR are limited to a criminal code, with a few provisions for the trial of civil suits. By its terms the CFR civil code provisions of the CFR applies only to Indians unless non-Indians stipulate to the jurisdiction of the CFR court.³⁵ Because the scope of jurisdiction provided by the CFR is so narrow, most tribes that have retained the CFR provisions have substantially revised it by adopting supplementary tribal statutes. More commonly, tribal governments have elected to dissolve the CFR court and organize tribal courts under the tribe's own constitution and code. Tribal codes that replace the CFR procedural provisions and generally contain familiar criminal and civil rules of procedure, definitions of criminal offenses, a juvenile and child welfare code, and a fish and game code. In recent years, some tribal councils have been active in adding regulatory chapters to their codes resulting in tribal statutory schemes which are substantially more comprehensive than those existing on reser-

31. *Kiowa Business Committee v. Ware*, 2 Tribal Ct. Rptr. A-45, A-45 (Ct. Indian Offenses 1980) ("The plaintiffs . . . filed this action in the Court of Indian Offenses, a C.F.R. Court."). 25 C.F.R. § 11.000 *et. seq.* (1985).

32. 50 Fed. Reg. 43235 (1985).

33. *Id.*

34. 25 CFR § 11.1(d).

35. *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp. 1338, 1340 (D. S.D. 1975) (tribal court may assert jurisdiction if non-member defendants agree to tribal court jurisdiction in written instrument). See also 25 C.F.R. § 11.22 (1986).

vations just a few years ago.³⁶

Litigants appearing in an Indian court should pay careful attention to sections of the applicable code dealing with the establishment of the court and the statutory limitations on its jurisdiction. These provisions vary from tribe to tribe and are to a significant extent based upon the unique history of the tribe. It cannot be assumed that the constitutional and statutory powers of all Indian courts are the same. The powers of Indian tribes to expel persons from their reservations, to control certain behavior of their members outside the reservation, and to raise sovereign immunity as a defense to any suit against the tribe are often governed by provisions of the code. The lack of a code provision in a specific area does not mean that the tribal court may not exercise inherent jurisdiction in that area of the law.³⁷ In general, it is the prerogative of the tribal court to interpret tribal statutes.³⁸

Learning the law of any new jurisdiction usually involves going beyond statutes and regulations set out in its code. Indian jurisdictions are similar in this regard with the added complication of tribal court reliance in some cases on customary and traditional law. Many tribal codes contain procedures for obtaining and presenting evidence regarding customary and traditional practices or beliefs that may be given the weight of law in the Indian court. While the enforcement of unwritten customary law may seem exotic to modern practitioners in these times of extensive codification, customary law has an accepted place in Anglo-American jurisprudence.³⁹ Even on a reservation where the tribal code does not refer to customary law, it is wise to seek information about the use of tribal customary law and how it may be applied to a case before the

36. *Burlington Northern v. Dep't. of Pub. Serv. Regulation*, — Mont. —, —, 720 P.2d 267, 268 (1986) (tribe adopted a common carrier statute regulating railroads).

37. *Chino v. Chino*, 90 N.M. 240, 244, 561 P.2d 476, 479 (1977) (tribal court had exclusive jurisdiction over dispute involving possession of land within reservation despite the fact that the tribal code did not contain an explicit remedy).

38. *R. J. Williams v. Fort Belknap Housing Auth.*, 719 F.2d 979, 981 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 3476 (1985) (interpretation of tribal law is the duty of the tribal court). See *Committee To Save Our Constitution v. United States*, No. CIV-83-3011, slip op. at 4, 11 Indian L. Rptr. 3035, 3035-36 (D.S.D. 1984) (tribal court ruling must be accepted by federal officials and federal court as the law of the tribe).

39. See 21A AM. JUR. 2D *Customs and Usages* § 1 (1981); see also *In re Adoption of Doe*, 89 N.M. App. 606, 620, 555 P.2d 906, 917 (1976) (Navajo custom to be recognized by state courts).

court.⁴⁰

Unfortunate results may arise from assuming that uncoded customs which govern tribal life on modern reservations will not be applied by the court.⁴¹ For example, the American concept of responsibility for damage caused by negligence and the defeat or mitigation of such responsibility by contributory or comparative negligence defenses is foreign to basic concepts of justice as understood by some tribes. On these reservations, customary law permits no excuse and requires payment for injuries by the party most responsible for the injury.⁴²

Tribal courts will generally follow their own precedents and give considerable weight to the decisions of other Indian courts. Finding those precedents requires diligence. While the Indian Law Reporter⁴³ includes many tribal court opinions, written tribal case law tends to be sparse. Only the Navajo courts publish a reporter.⁴⁴ Most tribal codes attempt to han-

40. *Johnson v. Johnson*, 3 Navajo Rptr. 9, 12 (1980) (tribal court authorized to apply state law only when no tradition or custom is available).

41. *Tom v. Tom*, 4 Navajo Rptr. 12, 13 (1983) (customary law of Navajo people requires father to support his children); *Halona v. MacDonald*, 1 Navajo Rptr. 189, 190, 1 Tribal Ct. Rptr. A-70, A-71 (1978) (venue dependent on traditional clan home of defendant, not actual residence). *Accord* *In the Matter of the Estates of Charley Nez Wauneka Sr.*, 13 Indian L. Rptr. 6049, 6049 (1986) (customary law controls distribution of real property obtained by customary usage, even if custom conflicts with tribal probate code); *In the Matter of the Interest of J.J.S., a Minor*, 4 Navajo Rptr. 192, 195 (D. Window Rock 1983) (customary or common law of the Navajo people will determine who, among two petitioners, is entitled to adopt an abandoned Navajo child); see also *Adoption of S.C.M., a Kwakiutl Indian*, 4 Navajo Rptr. 178, 179 (D. Window Rock 1983) (in the Navajo Nation, customary law and common law are the same and distribution of property belonging to deceased shall take place according to Navajo common law); *Apache v. Republic Nat'l Life Ins. Co.*, 2 Navajo Rptr. 250, 252 (D. Window Rock 1982) (Navajo customary law may be noticed by the court as an adjudicated fact and may be applied to commercial transactions and the tribal court is required to apply customary law); *Hepler v. Perkins*, 13 Indian L. Rptr. 6011, 6016 (Sitka Community Ass'n Tribal Ct. 1986) (clan membership flowing through female members of clan determines jurisdiction of tribal court over juveniles in child welfare matters). Cf. 25 C.F.R. §§ 11.23, 11.27, 11.29 (1985).

42. See *Makah Tribe v. Clallam County*, 73 Wash. 2d 677, 684-85, 440 P.2d 442, 447 (1968) (tribal custom to be recognized and enforced in state court). Compare *Howard v. Sharp*, 10 Indian L. Rptr. 6027, 6028 (Colo. River Tribal Ct. 1983) (comparative negligence standard adopted by tribal court) with *Boren v. Victorino*, No. 12-ATC-7940 (Acoma Pueblo Tribal Ct. May 14, 1980) (contributory negligence not a part of the customary law of the Pueblo and would not bar plaintiff's recovery).

43. In 1979 and 1980 the American Indian Lawyer Training Program published the Tribal Court Reporter [Tribal Ct. Rptr.]. In 1983 the Tribal Court Reporter was absorbed into the Indian Law Reporter [Indian L. Rptr.] also published by the American Indian Lawyer Training Program. Thus, a mode for publishing tribal court opinions is available, but it is not always used.

44. The Navajo Reporter is published by the Courts of the Navajo Nation at

dle the problems created by the lack of a large body of decided case law by explicitly establishing, in a ranked order of applicability, certain bodies of law that the court will apply to all cases coming before it.⁴⁵ While the creation of a system for publishing all important tribal decisions is in its early stages, litigants in the Indian courts should directly question court clerks, advocates, administrators and judges about prior decisions of the court that may be applicable to their case.⁴⁶

IV. JURISDICTION

A. *Exclusive Tribal Jurisdiction*

Under some circumstances it is necessary to file actions in an Indian court because no other court may exercise jurisdiction over the matter. Tribal jurisdiction may be exclusive in actions involving the activities of Indians, Indian tribes and their enterprises, property and agencies within an Indian reservation. The general theory on which such exclusive jurisdiction is based provides that tribal Indians are entitled to make their own laws and be ruled by them, and that the imposition of state or federal jurisdiction on activities within tribal territory would weaken the authority of Indian courts and legislatures.⁴⁷ Failure to utilize the Indian forum where such

Window Rock, Navajo Nation, Arizona. The Navajo Reporter contains all major opinions of the trial and appellate courts of the Navajo Nation since 1969. It is now in its fifth volume.

45. *Manygoats v. General Motors Acceptance Corp.*, 4 Navajo. Rptr. 94, 96 (1983) (where tribal court is directed by tribal statutes to apply "any laws of the United States which may be applicable," tribal court will make independent determination of the meaning of the federal law using federal and state interpretations of the law as a guide). Cf. *Johnson v. Johnson*, 3 Navajo Rptr. 9, 10 (1980) (specific ranking of sources of law to be applied by Navajo court included in Navajo code); *Crow Tribe Housing Auth. v. Little Horn State Bank*, 13 Indian L. Rptr. 6029, 6031 (Crow Tribal Ct. 1986) (absent Crow Tribal law, tribal court is free to adopt any body of law); COLVILLE TRIBAL CODE § 4.1.11 (1980) ("In all cases the court shall apply, in the following order of priority unless superseded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law.").

46. A short list of major sources of Indian law includes: F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1982); see also W. CANBY, *FEDERAL INDIAN LAW*, (1982); S. PEVAR, *THE RIGHTS OF INDIANS* (1982). Cf. 25 U.S.C. § 1 et seq. (1985); 25 C.F.R. § 1 et seq. (1985); 19 FED. PROC. L. ED. §§ 46.1-46.1094 (1983).

47. *Williams v. Lee*, 358 U.S. 217, 220 (1959) (where defendant was Indian and activity occurred on reservation, tribal court jurisdiction was exclusive forum, and use of state court processes was violation of civil rights of Indian defendant). See also *United States v. Blackfeet Tribal Court*, 244 F. Supp. 474, 477 (D. Mont. 1965) (tribal Indians are permitted to govern themselves and their territory and federal or state law is allowed to intrude only where Congress has clearly granted authority to federal or

jurisdiction is exclusive can render the actions of non-Indian courts and agencies void and unenforceable.⁴⁸

Where the tribe has exclusive jurisdiction, that jurisdiction generally cannot be defeated by invoking federal diversity jurisdiction.⁴⁹ Until recently the decisions of the Eighth and Ninth Circuits appeared to be in conflict on the matter of diversity jurisdiction. However, the Eighth Circuit now has conformed its rule to that of the Ninth.⁵⁰ The Tenth Circuit also has followed the Ninth Circuit rule and preserves tribal jurisdiction against claims of diversity jurisdiction.⁵¹ Exclusive tribal jurisdiction is also not defeated by filing an action against the Department of the Interior, hoping to invoke federal administrative remedies.⁵²

state officials); *Peterson v. District Court*, — P.2d —, —, 7 Indian L. Rptr. 4053, 4055 (Wyo. 1980) (tribal court has exclusive jurisdiction in collision between an auto driven by an Indian and a horse owned by an Indian on a U.S. Highway); *Arviso v. Dahozy*, 3 Navajo Rptr. 84, 84 (1982) (where parties to a marriage are enrolled Indians residing on a reservation, tribal court has exclusive jurisdiction); *Frejo v. Barney*, 3 Navajo Rptr. 233, 234 (D. Window Rock 1982) (when parties to an action are Indian, tribal courts have exclusive jurisdiction).

48. *McKenzie County Social Serv. Bd. v. V.G.*, 392 N.W.2d 399, 402 (N.D. 1986) (tribal court has exclusive jurisdiction to determine paternity matters when child and mother reside on reservation and alleged father is member of tribe). *Estate of James Wermey Pekah*, 13 Interior Bd. Indian App. 264, 266 (1985) (since state court acted without jurisdiction to order adopting of reservation Indian, state court order was null and void).

49. *Superior Oil v. Merritt*, 619 F. Supp. 526, 533 (D. Ut. 1985) (Congress did not intend diversity statute to limit tribal sovereignty by depriving Indian courts of exclusive jurisdiction over reservation based disputes); see also F. COHEN, *supra* note 43, at 317.

50. See, e.g., *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 688 (8th Cir. 1986). The general rule in most federal circuits is that a federal court will not accept jurisdiction in cases diversity when Indian court jurisdiction is likely. Two reasons have been asserted. First, federal diversity jurisdiction is derivative of state court jurisdiction and state courts do not have jurisdiction in most cases involving Indians or Indian property within a reservation. Second, where tribal laws and customs or actions of tribal governments or their agencies are at issue the courts have found that federal interpretation would be a direct interference with tribal government and the prerogatives of the Indian courts.

51. *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971, 982 (1987) (notwithstanding provisions of federal diversity statute, civil jurisdiction over activities of non-Indians on reservation land presumptively lies in tribal courts); see also *Superior Oil v. Merritt*, 619 F. Supp. at 553.

52. See *Atchison, Topeka, and Santa Fe R.R. v. Deputy Area Director*, 14 Interior Bd. Indian App. 46, 51, 93 Interior Dec. 79, 85 (1986) (Board is not the proper forum to challenge tribal tax law as being violative of the Indian Civil Rights Act). See also *Poncho v. Coshatta Tribe*, 14 Interior Bd. Indian App. 26, 29 (1986) (Board has no jurisdiction over decisions rendered by tribal officials in matters committed to the tribe); *Redfield v. Area Director*, 13 Interior Bd. Indian App. 365, 366, 13 Indian L. Rptr. 7009, 7010 (1985) (Board is not a proper forum to challenge an Indian Tribe's

B. Jurisdiction Over Indians and Indian Property

An Indian court can be described as a court of general jurisdiction⁵³ when that jurisdiction is applied to the activities of Indians on all lands within the boundaries of an Indian reservation or on Indian trust land outside of any reservation; i.e. in the "Indian country".⁵⁴ The territorial, personal, and subject matter jurisdiction of an Indian court is established by federal law, the tribal constitution, tribal customary law and the tribal code.⁵⁵

Outside the reservation, Indians are generally subject to state and federal law.⁵⁶ However, when Indians are on Indian trust land outside reservation, or exercise certain rights protected by federal agreement or treaty, or belong to a certain class of Indian children, tribal governments may subject them

interpretation of its own resolutions); *Hawley Lake Homeowners Ass'n. v. Deputy Ass't. Secretary - Indian Affairs*, 13 Interior Bd. Indian App. 276, 278-79, 12 Indian L. Rptr. 7043, 7045 (1985) (lease dispute between tribe and its lessee within exclusive jurisdiction of tribal court, divesting both the Board and the Bureau of Indian Affairs of jurisdiction). *Accord Benally v. Navajo Area Director*, 9 Interior Bd. Indian App. 284, 286, 89 Interior Dec. 252, 256 (1982) (tribal candidate for election denied appeal to Secretary of Interior because tribal law allowing such appeal had been repealed and Secretary had no independent authority).

53. *Moses v. Joseph*, 2 Tribal Ct. Rptr. A-51, A-52 (Sauk-Suiattle Tribal Ct. 1980) (unless specific tribal statute limits its powers, tribal court has jurisdiction over the subject matter of the cases brought before it).

54. *See* 18 U.S.C. § 1151 (1949) (although statute deals directly with criminal jurisdiction, federal courts have found that it defines scope of Indian country for the purpose of establishing civil jurisdiction); *Decoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (Supreme Court has recognized that § 1151 generally applies to questions of civil jurisdiction); *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1078 n.15 (D. Utah 1981), *aff'd on other grounds*, 773 F.2d 1087 (10th Cir. 1985) (District court ruled that § 1151 applies to questions of civil jurisdiction). *See also Sandoval v. Tinian, Inc.*, 13 Indian L. Rptr. 6041, 6043 (D. Crownpoint 1986) (Indian court has jurisdiction to entertain action against non-Indian that arose outside reservation, but within Indian country and dependent Indian community). *But see General Motors Acceptance Corp. v. Chischilly*, 96 N.M. 113, 116, 628 P.2d 683, 685 (1981) (U.S. Supreme Court's assertion that 25 U.S.C. § 1151 defines civil jurisdiction in Indian country found unacceptable by state court).

55. *Cf. Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 95 (8th Cir. 1956) (tribal courts have inherent jurisdiction over all matters not removed from their jurisdiction by federal government, and federal statutes and regulations support authority of tribal courts); *Treho v. United States*, 464 F. Supp. 113, 115 (D. Nev. 1978) (Indian court has jurisdiction on all parts of reservation including individual Indian allotments); *Leon v. Numkena*, 142 Ariz. 307, 310-11, 689 P.2d 566, 568 (Ariz. Ct. App. 1984) (subject matter jurisdiction in divorce action is conferred on Indian court by the tribal constitution and code).

56. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law . . .").

to the jurisdiction of the Indian court even when their activities take place outside the reservation.⁵⁷

Indian courts are usually prohibited from exercising jurisdiction over agents of the federal government, whether the agents are Indian or non-Indian, when such agents are involved in official business on the reservation and the exercise of tribal jurisdiction over them would interfere with duties imposed by federal law.⁵⁸ This rule does not, however, apply to state agents. The tribe may utilize its exclusionary jurisdiction to prevent state agents from acting on the reservation even when the state agent might have authority to act under state law.⁵⁹

Criminal activities of Indians on the reservation are subject to the jurisdiction of the Indian court except as limited by the tribal code and constitution and the provisions of the Indian Civil Rights Act.⁶⁰ In some criminal matters Indian court jurisdiction is exclusive.⁶¹ Pursuant to the Indian Civil Rights Act, however, an Indian court may not criminally punish by a fine larger than \$5000.00 or a jail sentence longer than one year for any one offense.⁶² This limitation relates to sen-

57. See *Settler v. Lameer*, 507 F.2d 231, 238 (9th Cir. 1974) (tribe had treaty right to criminally enforce off-reservation fishing regulations). See also *United States v. Washington*, 384 F. Supp. 312, 340-41 (tribe has right to regulate treaty-protected fisheries outside reservation). Cf. *Indian Child Welfare Act*, 25 U.S.C. §§ 1901-63; F. COHEN, *supra* note 43, at 347-48 ("outside Indian country tribal courts can have jurisdiction based on tribal membership . . .").

58. *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986) (tribal court lacks jurisdiction to enjoin federal employee from carrying out official duties on reservation). Accord *Armstrong v. United States*, 306 F.2d 520, 522-23 (10th Cir. 1962) (Indian courts have no jurisdiction to scrutinize activities of government agents lawfully upon reservation); *United States v. White Mountain Apache Tribe*, 604 F. Supp. 464, 466 (D. Ariz. 1985), *aff'd*, 784 F.2d 917 (9th Cir. 1986) (tribal courts have no authority to restrict federal employees conducting official business on reservation); *United States v. Blackfeet Tribe*, 364 F. Supp. 192, 195, *aff'd on rehearing*, 369 F. Supp. 562, 565 (D. Mont. 1973) (tribal courts have no in rem jurisdiction over federal agents seizing gambling equipment on reservation). But see *Donovan v. Navajo Products Industries*, 692 F.2d 709, 712 (10th Cir. 1982) (federal OSHA inspectors can be lawfully excluded from Navajo lands).

59. *People v. Quechan Tribe of Indians*, 424 F. Supp. 969, 977 (S.D. Cal. 1977) (state game agents have authority to enforce state law while on reservation, but tribe may lawfully exclude agents from reservation making enforcement impossible). See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326-27 (1983) (tribal jurisdiction sufficient to provide tribe with exclusive power to exclude state from regulating hunting and fishing by non-Indians on reservation lands).

60. 25 U.S.C. §§ 1301-26 (1986).

61. *United States v. Johnson*, 637 F.2d 1224, 1231 (9th Cir. 1981) (generally tribal courts retain exclusive jurisdiction over crimes between Indians).

62. 25 U.S.C. § 1302 (1986), *as amended* by Public Law 98-570 § 4217 (1986).

tencing and not to the nature of the crimes which may be charged and punished in the tribal court. For example, even with this sentencing limitation, an Indian court has jurisdiction to try an Indian on a charge of manslaughter, but the maximum penalty on conviction would be one year in jail and/or a \$5000.00 fine. Furthermore, a sentence totaling more than one year may result from convictions on several separate charges. Such sentence "stacking" is not prohibited by the Indian Civil Rights Act.⁶³

Matters involving the probate of property held in trust for Indians by the United States are handled exclusively by special Department of the Interior administrative law courts.⁶⁴ Indian courts may handle the probate of non-trust, real and personal property.⁶⁵ Tribes may exercise their powers of eminent domain through their courts⁶⁶ and may not take property without providing fair compensation and due process of law.⁶⁷ Indian courts, like state courts, may not directly affect the ownership of trust lands.⁶⁸ Under certain circumstances, however, an Indian court can affect transfers of trust assets from Indians where the tribal court has jurisdiction over the person of the Indian.⁶⁹ A panel of the Eighth Circuit Court of Appeals recently found that an Indian court may be the only court with jurisdiction to foreclose a mortgage on Indian trust lands made pursuant to 25 U.S.C. 483a.⁷⁰ Under the rule announced by the

63. *Ramos v. Pyramid Tribal Court*, 621 F. Supp. 967, 969, (D. Nev. 1985) (defendant convicted of seven offenses receives sentence of two years).

64. 25 U.S.C. §§ 371-80 (1986).

65. *Estate of Navajo Joe*, 4 Navajo Rptr. 99, 99 (1983) (tribal court has jurisdiction over probate of grazing permit for 50 sheep units).

66. *Seneca Constitution Rights Organization v. George*, 348 F. Supp. 48, 51 (W.D.N.Y. 1972) (tribe had sovereign authority to exercise powers of eminent domain over Indian land).

67. *Dennison v. Tucson Gas and Electric Co.*, 1 Navajo Rptr. 95, 96 (1974) (Navajo Tribe has power of eminent domain but may not exercise the power without providing due process of law and just compensation for property taken).

68. *Fredericks v. Mandel*, 650 F.2d 144, 146 (8th Cir. 1981) (tribal court lacks jurisdiction to determine title to Indian trust allotments); *Benally v. John*, 4 Navajo Rptr. 39, 43-44 (1983) (while United States has exclusive right to determine title to allotted trust lands, tribal court had jurisdiction to determine whether a transfer of an allotment was coercive or fraudulent and the power to provide a remedy for such an unlawful transfer); *Colorado River Tribes v. Anderson*, 12 Indian L. Rptr. 6001, 6002 (Colo. River Tribal Ct. 1984) (action in tribal court seeking title to allotment dismissed on grounds that United States is indispensable party and cannot be joined).

69. *Conroy v. Conroy*, 575 F.2d 175, 182-83 (8th Cir. 1978) (tribal court has jurisdiction to dispose of property of an Indian marriage, real or personal).

70. *Northwest South Dakota Prod. Credit Assn. v. Smith*, 784 F.2d 323, 326-27 (8th Cir. 1986) (federal court lacks jurisdiction to foreclose mortgage on Indian lands

Eighth Circuit, federal courts have not been granted the requisite jurisdiction to foreclose on Indian lands and state courts, even when the Indian land is located on a reservation subject Public Law 83-280, lack jurisdiction.⁷¹

Some courts have found that Indian tribes may cede court jurisdiction over the actions of Indians within a reservation to a state by making an express provision for such a cession in the tribal code.⁷² The better rule, however, is that pursuant to federal law⁷³ such a cession violates the federal scheme for transfer of jurisdiction and is therefore void;⁷⁴ and, state court actions taken without jurisdiction are void and unenforceable.⁷⁵ Because a tribal code contains no provision for a specific form of action does not mean that the tribe has surrendered this jurisdiction to the state.⁷⁶ Rather, when the tribe acts by legislation to assert jurisdiction, any state jurisdiction which

obtained pursuant to 25 USC § 483a; state court also lacks jurisdiction; tribal court has exclusive jurisdiction).

71. *Annis v. Dewey County Bank*, 335 F. Supp. 133, 135-36 (D. Mont. 1971) (security interest on reservation land does not imply state court jurisdiction). *See also* *Crow Tribe v. Deernose*, — Mont. —, —, 487 P.2d 1133, 1135-36 (1971) (state court lacks jurisdiction to foreclose mortgage on Indian lands obtained pursuant to 25 U.S.C. § 483a (1983)). *Cf.* 25 U.S.C. § 1322(b) (1956) (nothing in section shall confer jurisdiction on state court to adjudicate property interests). As to the effect of Public Law 83-280, *see supra* notes 89-100 and accompanying text.

72. *Cobell v. Cobell*, 503 F.2d 790, 795 (9th Cir. 1974) (tribal code which explicitly disclaims jurisdiction over certain subject matter permitted state court to exercise jurisdiction). *See* *Kuykendall v. Tim's Buick*, 149 Ariz. 465, 719 P.2d 1081 (Ariz. Ct. App. 1985) (tribal code provision eschewing jurisdiction over disputes between non-tribal members allows state to assert jurisdiction); *see also* *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 142-43 (Minn. App. 1985) (rules of tribal court requiring enforcement of state custody orders relinquished tribal jurisdiction over child custody to state).

73. 25 U.S.C. §§ 1322, 1326 (1983).

74. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold*, 106 S. Ct. 2305, 2312 (1986) (state's exclusion of Indians from its courts was inconsistent with federal scheme for granting Indian jurisdiction to states and, therefore, preempted by federal law). *See also* *Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971) (because Montana had not accepted Congressional offer of Indian jurisdiction, state courts did not have jurisdiction over reservation Indians); *Francisco v. State*, 113 Ariz. 427, 434-35, 568 P.2d 1, 5 (1976) (because Arizona had not acted to accept jurisdiction under Public Law 83-280, its courts lacked jurisdiction over reservation Indians).

75. *McKenzie County Social Serv. Bd. v. V.G.*, 392 N.W.2d 399, 402 (N.D. 1986) (state court order finding Indian to be father of child, void for lack of state court jurisdiction). *Accord* *Estate of James Wermey Pekah*, 13 Interior Bd. Indian App. 264, 266 (1985) (adoption decree at issue in Indian probate proceeding invalid because it was rendered by a state court lacking jurisdiction).

76. *Joe v. Marcum*, 621 F.2d 358, 361-62 (10th Cir. 1980) (tribe is permitted to choose whether to allow certain forms of action in its courts; refusal does not surrender jurisdiction to state courts); *see also* *Chino v. Chino*, 90 N.M. 240, 244, 561 P.2d 476, 479 (1977).

has been asserted is preempted.⁷⁷ The incorporation into the tribal law of state or federal substantive law through reference to such sources of law in the tribal code does not grant jurisdiction to state or federal institutions.⁷⁸

C. Jurisdiction Over Non-Indians

Federal law, tribal codes, or tribal constitutions may limit the jurisdictions of Indian courts over non-Indians acting within the reservation.⁷⁹ For instance, Indian courts, without a federal delegation of authority to do so, may not try non-Indians for criminal offenses.⁸⁰ In addition, Indian courts under

77. *Johnson v. Dixon*, 4 Navajo Rptr. 108, 109-10 (1983) (when Indian Nation enters a field of legislation, state jurisdiction is preempted); *see also* *County of Vilas v. Chapman*, 122 Wis. 2d 211, 214-15, 361 N.W.2d 699, 702 (1985) (when tribe enacts legislation taking jurisdiction on reservation, state jurisdiction is preempted). *Accord* *Wildcatt v. Smith*, 69 N.C. App. 1, 8, 316 S.E.2d 870, 877, 11 Indian L. Rptr. 5026, 5030 (1984) (assertion of state jurisdiction after creation of tribal court would infringe on tribal sovereignty).

78. *R.J. Williams v. Fort Belknap Hous. Auth.* 719 F.2d 979, 982 (9th Cir. 1983) (tribal code incorporating state law by reference did not cause actions taken under tribal code to be considered under color of state law). *Accord* *Oliver v. Udall*, 306 F.2d 819, 821-22 (11th Cir. 1962) (when Navajo Tribe adopted C.F.R. provisions, provisions became tribal law and were no longer considered federal law); *Nelson v. Dubois*, 232 N.W.2d 54, 57-58 (N.D. 1975) (state motor vehicle code incorporated by reference into tribal code did not cede jurisdiction to state); *Boyer v. Shoshone-Bannock Tribes*, 92 Idaho 257, 261-62, 441 P.2d 167, 170 (1968) (code of law adopted by tribe is tribal, not federal law). *See also* *Wauneka v. Campbell*, 22 Ariz. App. 287, 293, 526 P.2d 1085, 1089 (1974) (tribal statute requiring possession of state driver's license did not cede traffic jurisdiction to state). *Cf.* *Begay v. Miller*, 70 Ariz. 380, 385-86, 222 P.2d 624, 628 (1950) (marriage license issued by state does not grant state court jurisdiction over divorce of Navajo Indians).

79. *Compare* 25 C.F.R. § 11.22 (1986) (limiting C.F.R. Court jurisdiction to Indians and those who stipulate to Indian jurisdiction) *with* *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976) (tribal jurisdiction limited by tribal law to members of the tribe).

80. This is not to say that Indian police officers may not arrest non-Indians. *But see, e.g.,* *Olipphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978). (limiting tribal court ability to try non-Indians). *See also* *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179-80 (9th Cir. 1975) (power to exclude from the reservation includes power to detain and determine whether grounds for exclusion exist); *Ryder v. State* 98 N.M. 316, 319, 648 P.2d 773, 774-75 (1982) (Indian officer had power to stop and detain non-Indian under federal and state statutes). *Cf.* *Jurisdiction Over Offenses by Non-Indians in Indian Country*, Op. Solicitor Dept. Interior (April 10, 1978). It has not been determined whether a C.F.R. Court could exercise criminal jurisdiction over non-Indians. *Compare* 25 C.F.R. § 11.22 (1986) (criminal jurisdiction of C.F.R. Courts limited to Indians) *with* I Op. Solicitor Dept. Interior 872 (1939) (Dept. of Interior could delegate to Indian courts criminal jurisdiction over "Indians" that are not members of any tribe). A bill was recently introduced in the United States Senate to provide the Pima-Maricopa Tribal Court with certain criminal jurisdiction over non-Indians. *To Provide For The Proper Administration Of Justice Within The Salt River Pima Maricopa Reservation By Granting Jurisdiction To The Salt River Pima-Maricopa Indian Community Over*

some circumstances, may not exercise civil jurisdiction over non-Indians acting on the reservation, when those activities occur on lands to which Indian title has been extinguished.⁸¹ This rule regarding assertion of civil jurisdiction over non-Indians acting on fee lands has several exceptions. Indian courts may impose civil jurisdiction on non-Indians: when Congress has delegated to the tribes power to regulate non-Indian behavior;⁸² when a non-Indian has entered into consensual relationships with Indians or the tribe;⁸³ or where the activities of a non-Indian on fee patented lands within a reservation have an impact on tribal health, safety, or economic security.⁸⁴ The result of these rather broad exceptions is that tribal courts have generally found that in civil matters arising on the reservation, they may assert jurisdiction over non-Indians.⁸⁵

The provisions of the Indian Civil Rights Act, as well as tribal constitutional and code provisions, protect the rights of

Certain Criminal Misdemeanor Offenses: Hearings on S. 2564 Before the Select Comm. on Indian Affairs, 99th Cong., 2nd Sess. (1986).

81. *United States v. Montana*, 450 U.S. 544, 557 (1981) (tribal courts have no jurisdiction to regulate hunting or fishing on non-Indian land on the Crow Reservation).

82. *United States v. Mazurie*, 419 U.S. 544, 557 (1976) (United States lawfully delegated some authority to Indian tribes for regulation of liquor sales on reservation). *Accord Nance v. Environmental Protection Agency*, 645 F.2d 701, 714-15 (9th Cir. 1981) (delegation by agency to tribe authority to regulate air quality Constitutional even though tribal authority would be exercised over non-Indians); *United States v. Morgan*, 614 F.2d 166, 171 (8th Cir. 1980) (tribal court may exercise jurisdiction over non-Indians under direct delegation by Congress). *See also Washington Dept. of Ecology v. Environmental Protection Agency*, 752 F.2d 1464, 1472 (9th Cir. 1985) (tribal governments should participate in hazardous waste management). *Cf.* 18 U.S.C. § 1161 (1984) (Indian liquor laws inapplicable in non-Indian country); 30 U.S.C. § 1300 (1986) (Secretary shall make study regarding surface mining on Indian land); 42 U.S.C. §§ 7401-7642 (1983) (air quality and emission statutes).

83. *Washington v. Colville Confederated Tribes*, 447 U.S. 134, 152 (1980) (tribe may impose tax on sales to non-Indians who enter into consensual relationships with Indians on its reservation); *see also Sandoval v. Tinian, Inc.*, 13 Indian L. Rptr. 6041, 6043 (D. Crownpoint 1986) (tribal court may assert jurisdiction over non-Indians who enter into business relationships with Indians on Indian land).

84. *Ashcroft v. U.S. Dept. of Interior*, 679 F.2d 196, 199 (9th Cir. 1982) (Indian tribe retains sovereign power to protect tribal self-government and control internal relations on non-Indian fee lands with reservation, including power to regulate commerce with tribal members); *see also United States v. Montana*, 450 U.S. at 563-64.

85. *Window Rock Mall v. Day IV*, 3 Navajo Rptr. 58, 59 (1981) (non-Indian corporation doing business within Navajo Nation is subject to jurisdiction of Navajo courts in dispute over sublease); *Deal v. Blatchford*, 3 Navajo Rptr. 159, 160 (1982) (any person doing injury within Navajo Nation is subject to jurisdiction of Navajo courts). *Cf. Keith v. Allred*, 3 Navajo Rptr. 191, 193 (D. Chinle 1981) (non-Indian is not injured by Navajo court's assertion of jurisdiction).

non-Indians who are before the Indian courts.⁸⁶ For example, the plaintiffs in *Santa Clara Pueblo v. Martinez*,⁸⁷ the seminal case that defined the scope of the Indian Civil Rights Act, were persons seeking enrollment in a tribe. Their lack of enrolled status made them, by definition, non-Indians. The Supreme Court found the remedy of these non-Indian plaintiffs to be in a tribal forum.⁸⁸

D. Concurrent Jurisdiction: Public Law 83-280 and the Indian Courts

Enacted in 1953, Public Law 83-280⁸⁹ granted certain states some jurisdiction over Indians and Indian country. The impact of this legislation on the jurisdiction of Indian courts has long

86. See *Oliphant v. Suquamish Tribe*, 435 U.S. at 211-12; see also *supra* note 85.

87. 436 U.S. 49 (1978).

88. A number of recent cases have found the activities of non-Indians to be subject to Indian jurisdiction. See *United States v. Montana*, 450 U.S. at 563-64 (activities affecting tribal health, safety, and economic security). See also *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199-200 (1985) (Indian tribe may levy tax on non-Indian companies removing minerals from Indian lands, even when tax has not been approved by the Secretary of the Interior); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (tribal civil jurisdiction sufficient to provide tribe with jurisdiction over non-Indians hunting and fishing on reservation); *Merrion v. Jicarilla Apache Tribes*, 455 U.S. 130, 138-39 (1982) (Indian tribe may tax non-Indian company producing oil and gas removed from Indian land); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-61 (tribe may tax sales to non-Indians on reservation); *United States v. Mazurie*, 419 U.S. at 557 (tribe could control liquor sales). See generally, *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979 (9th Cir. 1983) (tribal court has jurisdiction over contract dispute between tribal housing authority and non-Indian contractor); *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (tribe has jurisdiction to regulate hunting and fishing by non-Indians, exclusive of state); *Babbitt Ford v. Navajo Tribe*, 710 F.2d 587 (9th Cir. 1983) (tribe may enforce repossession statute against non-Indians on reservation); *Snow v. Quinalt Indian Nation*, 709 F.2d 1319 (9th Cir. 1983) (tribe may tax business engaging in commercial activity with Indians within reservation); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981) (tribe may enforce health and building regulations); *Knight v. Shoshone & Arapaho Tribes*, 670 F.2d 900 (10th Cir. 1982) (land use regulations); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) (tribe may regulate riparian rights in navigable water); *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981) (clean air regulation); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457 (D. Nev. 1986) (jurisdiction in tort actions); *Sechrist v. Quinalt Indian Nation*, No. C76-823M, 9 Indian L. Rptr. 3064 (W.D. Wash. May 7, 1982) (zoning and land use regulations extend to non-Indian lands within reservation); *Lummi Tribe v. Hallaver*, No. C79-682R, 9 Indian L. Rptr. 3025 (W.D. Wash. Feb. 5, 1982) (tribe has exclusive authority to operate sewer system on reservation); *Thomsen v. King County*, 39 Wash. App. 505, 694 P.2d 40, 12 Indian L. Rptr. 5012 (1985) (jurisdiction over non-Indians on fee patented lands with reservation); *Leon v. Numkena*, 142 Ariz. App. 307, 689 P.2d 566, 11 Indian L. Rptr. 5068 (Ariz. Ct. App. 1984) (marriage of Indian to non-Indian and custody of children).

89. 25 U.S.C. §§ 1321-26 (1976).

been a concern of tribal governments. This concern is especially great in states, such as Washington, where this statute constantly raises questions regarding the scope of state jurisdiction on the reservations.

The Indian jurisdiction assumed by states under Public Law 83-280 has been found not to exclude tribal jurisdiction. To date, all federal rulings on this issue conclude that tribal and state jurisdiction are concurrent in those areas affected by Public Law 83-280.⁹⁰ In a landmark case dealing with the scope of Public Law 83-280 jurisdiction, the Supreme Court did not decide the question.⁹¹ On remand, however, the district court said: "The jurisdiction exercised by the State of Washington over the plaintiff (Yakima Nation) and its members is concurrent with the jurisdiction of the Yakima Nation over its own members."⁹² Further support for the rule is found in a recent Alaska ruling that while Public Law 83-280 excluded federal court jurisdiction from causes of action governed by its provisions, state and tribal jurisdiction over these same causes of action is concurrent.⁹³

The reasoning of these federal opinions is based on the historic dual nature of federal-tribal jurisdiction.⁹⁴ Prior to the enactment of Public Law 83-280, reservation Indians were subject to the concurrent jurisdiction of two separate sovereigns: the United States and the tribal government of the specific reservation.⁹⁵ When Congress enacted Public Law 83-280, it said nothing about dissolving tribal sovereignty or tribal jurisdic-

90. *Yakima Nation v. Washington*, No. 2732 (E.D. Wash. May 18, 1981) (tribe has concurrent jurisdiction over its members where state has asserted jurisdiction over Indians under Public Law 83-280). *Accord* *Colville Confederated Tribes v. Beck*, No. C78-76, 6 Indian L. Rptr. F-8 (E.D. Wash. Dec. 18, 1978) (concurrent criminal jurisdiction); *State v. Michael*, 729 P.2d 405 (Idaho 1986) (tribal court may have concurrent jurisdiction with state court on reservation subject to Pub. L. 83-280). *See also* *Regarding Criminal Jurisdiction on the Seminole Reservation in Florida*, Op. Solicitor Dept. Interior, 85 Interior Dec. 433, 6 Indian L. Rptr. H-1 (Nov. 14, 1978); F. COHEN, *supra* note 43, at 367.

91. 439 U.S. 463, 488 n. 32 (1979).

92. *Yakima Nation v. Washington*, No. 2732 (E.D. Washington, May 18, 1981).

93. *Fawcett v. Fawcett*, 13 Indian L. Rptr. 5063 (Sup. Ct. Alaska, 1st Dist. 1986). *But see* *Native Village of Nenana v. State*, 722 P.2d 219, 222 (Alaska 1986) (court refused to decide general question of concurrency between tribal and state court jurisdiction).

94. *Hepler v. Perkins*, 13 Indian L. Rptr. 6011, 6015 (Sitka C. Ass'n Tribal Ct. 1986) (under Pub. L. No. 83-280, state and tribal courts have concurrent jurisdiction over child welfare matters).

95. *See generally* *United States v. Wheeler*, 435 U.S. 313 (1978) (prosecution in both tribal and federal courts not double jeopardy).

tion over the reservation, but granted to the states some of the federal jurisdiction once exercised by the United States concurrently with the tribes. As a result, some states obtained through a combination of federal, state, and tribal action, certain kinds of criminal and civil jurisdiction on the reservation.⁹⁶ This jurisdiction is exercised by the states concurrently with that of the tribes. The United States did not, however, by enacting Public Law 83-280, diminish tribal jurisdiction. When Congress has acted to abolish or remove jurisdiction from the Indian courts it has done so expressly.⁹⁷ In ruling on their own jurisdiction, therefore, Indian courts on reservations where Public Law 83-280 has some effect, will generally apply the rules of law applicable to courts exercising concurrent jurisdiction.⁹⁸

The limited jurisdiction conferred by Public Law 83-280 has not stripped the Indian courts of their civil regulatory jurisdiction over persons and lands within the territory of the tribe.⁹⁹ And it has been held that Public Law 83-280 granted the states no civil regulatory jurisdiction at all.¹⁰⁰

96. State jurisdiction under Pub. L. No. 83-280 is limited to those Indians and lands specifically set out in a state's assertion of jurisdiction. *See, e.g., Idaho v. Allan*, 100 Idaho 918, 607 P.2d 426, 7 Indian L. Rptr. 4031 (1980), (state court had no jurisdiction over tribal Indians from other states).

97. *Muskogee (Creek) Nation v. Bureau of Indian Affairs*, 131 Interior Bd. Indian App. 211, 213-14, 92 Interior Dec. 309, 314 (1985) (United States expressly removed general civil and criminal jurisdiction of Creek Tribal courts and later Acts of Congress did not restore that jurisdiction). *See also Collins, Limits on Tribal Jurisdiction*, 54 WASH. L. REV. 479, 496 n. 146 (1979).

98. *Hepler v. Perkins*, 13 Indian L. Rptr. at 6013-15.

99. *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 750, 758 (E.D. Wash. 1985) (jurisdiction of tribe to enforce land use regulations on non-Indian fee lands within the reservation).

100. *Cabazon Band v. County of Riverside*, 783 F.2d 900, 902 (9th Cir. 1986), *aff'd*, *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987) (Pub. L. No. 83-280 does not grant states civil regulatory jurisdiction on Indian lands). *Accord United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986) (distinguishing civil, criminal and regulatory state laws); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245, 249 (D. Conn. 1986) (grant of power to states limited to criminal prohibition). *See also Morongo Band of Mission Indians v. Area Director*, 7 Interior Bd. Indian App. 299, 299-300, 86 Interior Dec. 680, 682 (1979) (Public Law 83-280, did not grant general civil regulatory jurisdiction to states); *Thomson v. King County*, 39 Wash. App. at 508-09, 694 P.2d at 43, 12 Indian L. Rptr. at 5013-14 (state civil jurisdiction limited to private causes of action and Pub. L. No. 83-280 does not provide the state with any civil regulatory jurisdiction); *State v. Lemieux*, 106 Wis. 2d 484, 490, 317 N.W.2d 166, 169, 9 Indian L. Rptr. 5037, 5038-39 (Ct. App. 1982), *aff'd*, 110 Wis. 2d 158, 327 N.W.2d 669 (1983) (where violations of state statute are not punished criminally, state had no jurisdiction under Pub. L. No. 83-280 to enforce regulatory statute against Indian).

E. Exclusionary Jurisdiction

Modern cases recognize the ancient, sovereign power of tribes to exclude non-members from their reservations.¹⁰¹ The exclusion action is considered an exercise of civil jurisdiction.¹⁰² Most tribes have codified this power and have placed authority to exclude totally within their courts. An exclusion proceeding usually involves a non-jury hearing at which the person being expelled is entitled to appear and contest a charge that he violated one of the grounds set out in the tribal code. Grounds for exclusion vary to some degree, but they generally involve removal of non-members from the reservation who are found to have violated tribal law or to be a danger to the security of the community.¹⁰³

V. CONSTITUTIONAL AND CIVIL RIGHTS IN THE INDIAN COURTS

A. The Indian Civil Rights Act

The civil rights of citizens, both Indian and non-Indian, touched by actions of tribal governments are most effectively enforced through proceedings in the Indian courts. Civil rights suits filed in state and federal courts against tribal governments and officials will usually be dismissed on two grounds: first, because Indian tribes enjoy certain immunities from suit;¹⁰⁴ and second, because tribal governments, as separate sovereigns predating the United States Constitution, are not subject to the provisions of the federal bill of rights.¹⁰⁵ Tribal governments are reluctant to waive sovereign immunity so as

101. See *supra* note 54. See also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138-39 (1982) (power of exclusion is basis for exercise of tribal sovereign authority over non-Indians within reservation). But see *Dodge v. Nakai*, 298 F. Supp. 26, 34 (D. Ariz. 1969) (exclusion of non-Indian by tribal council constituted unlawful bill of attainder).

102. *Hardin v. White Mountain Apache Tribe*, 761 F.2d 1285, 1288 (9th Cir. 1985) (exercise of tribal power to exclude is considered civil matter).

103. *Naswood v. Foremost Financial Services*, 3 Navajo Rptr. 138, 140 (1982) (corporation that disobeyed tribal court order may be barred from doing business on reservation).

104. See *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165, 172 (1977) (Indian tribes retain common law sovereign immunity from suit). See also *Gover & Lawrence, Avoiding Santa Clara Pueblo v. Martinez*, 8 HAMLINE L. REV. 497 (1985); *Johnson & Madden, Sovereign Immunity in Tribal Courts*, XII AM. INDIAN L. REV. 2 (1986); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 5 (1982).

105. See *Talton v. Mayes*, 163 U.S. 376, 382 (1896) (prisoners writ of habeas corpus denied; fifth amendment does not apply to tribes); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (9th Cir. 1959) (first amendment does not protect peyote used in religious ceremony from being banned by tribal law).

to allow suits against the tribe in state or federal courts, largely because they are poor and are unable to afford the financial liability that such waivers would entail.¹⁰⁶

Some tribal constitutions contain a specific bill of rights and some tribes have adopted statutory definitions of civil rights.¹⁰⁷ However, in 1968, to provide for a clear declaration of civil rights on all reservations, Congress adopted a bill of rights for the tribes as a part of the Indian Civil Rights Act.¹⁰⁸ The federal courts quickly found in the Act broad jurisdictional grounds to resolve inter-tribal disputes. Subsequently, the United States Supreme Court in *Santa Clara Pueblo v. Martinez* severely limited the power of the federal courts to entertain claims under the Act, but held the Act applicable, through the Indian courts, to the actions of all tribal governments and their agencies.¹⁰⁹

Indian courts have generally taken the position that under the provisions of the Indian Civil Rights Act, they have jurisdiction to construe and enforce provisions of tribal constitutions;¹¹⁰ and, despite claims of sovereign immunity by tribes and tribal officials, they have jurisdiction to enforce the Act where *ultra vires* actions by tribal agencies or officers are alleged.¹¹¹ Also, Indian courts have consistently held that the

106. Report of the Task Force On Indian Development, Assistant Secretary for Policy and Budget Administration, United States Department of the Interior (1986) Govt. Printing Office O-168-060QL-3. Cf. 25 U.S.C. §§ 450F(1), 450(g) (1976).

107. See NAVAJO TRIBAL CODE tit. 1, §§ 1-1.9 (1967). See also CONSTITUTION & BY-LAWS OF THE PUEBLO OF ZUNI (1970).

108. Cf. 25 U.S.C. §§ 1301-28 (1986).

109. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (Indian courts are appropriate forum to vindicate rights under the Indian Civil Rights Act). *Accord* *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312, 11 Indian L. Rptr. 2063, 2065 (10th Cir. 1984) (substantive rights against Indian tribes created by the Indian Civil Rights Act to be vindicated through tribal forums which are obliged to apply the statute and recognize rights).

110. *Sekaquaptewa v. Hopi Tribal Election Bd.*, 13 Indian L. Rptr. 6009, 6010 (Hopi Tribal Ct. 1986) (tribal constitutional right of adult Hopis to vote in tribal elections cannot be limited by tribal election ordinance). *Accord* *Thompson v. Cheyenne River Sioux Tribe*, 13 Indian L. Rptr. 6005, 6006 (Cheyenne River Sioux Ct. App. 1985) (tribal court has duty to assume jurisdiction over constitutional questions presented); *Means v. Oglala Sioux Tribal Council*, 11 Indian L. Rptr. 6013, 6014 (Oglala Sioux Tribal Ct. 1984) (tribal court has jurisdiction to determine whether tribal ordinance violates tribal constitution) Cf. *Squaxin Island Tribe v. Thomas*, 2 Tribal Ct. Rptr. A-60, A-61 (Squaxin Island Tribal Ct. 1980) (tribal law and order code held invalid because the manner in which it was adopted was inconsistent with tribal constitution).

111. *Comm. for Clean Gov't v. Cheyenne River Sioux Tribal Council*, 11 Indian L. Rptr. 6043, 6043 (Cheyenne River Sioux Ct. App. 1984) (tribal court has jurisdiction in suit against individual tribal council members where *ultra vires* actions are alleged).

Act provides them with the responsibility and jurisdiction to deal with alleged violations of the Act¹¹² and to review actions of the tribal legislature for compliance.¹¹³

B. Civil Rights in the Tribal Courts

In the majority of reported cases, Indian courts have accepted the view that they are responsible for enforcing the Indian Civil Rights Act. One Indian court, however, concluded that it could not enforce the provisions of the Indian Civil Rights Act unless the tribal legislature had, by statute, specifically waived tribal sovereign immunity.¹¹⁴ This holding is

Accord Kiowa Business Comm. v. Ware, 2 Tribal Ct. Rptr. A-45, A-47 (Ct. Indian Offenses Kiowa Tribe 1980) (suit requesting injunctive relief from alleged *ultra vires* actions of tribal officials, would not be barred by sovereign immunity). *Cf.* Holy Rock v. Tribal Election Bd., 10 Indian L. Rptr. 6009, 6009 (Oglala Sioux Tribal Ct. 1982) (administrative officials performing their duties according to law are immune from suit but court may review their actions to determine propriety). *Compare* Burnette v. Rosebud Sioux Tribe, 1 Tribal Ct. Rptr. A-51, A-51 (Rosebud Sioux Tribal Ct. 1978) (suit claiming that actions of tribal officials were unlawful, unconstitutional, and *ultra vires* would not be barred by sovereign immunity) *with* Grant v. Greivance Comm. of the Sac & Fox Tribe, 2 Tribal Ct. Rptr. A-39, A-53 (Ct. Indian Offenses Sac & Fox Tribe 1981) (because tribal grievance committee acted within the authority lawfully delegated to it by the tribe, suit would be barred by sovereign immunity).

112. *Montreal v. Cheyenne River Sioux Tribe*, 13 Indian L. Rptr. 6002, 6004 (Cheyenne River Sioux Ct. App. 1985) (although Fifth and Fourteenth Amendments to United States Constitution not applicable to tribe, Indian Civil Rights Act requires due process of law); *Le Compte v. Jewett*, 12 Indian L. Rptr. 6025, 6026 (Cheyenne River Sioux Ct. App. 1985) (tribal sovereign immunity waived by Indian Civil Rights Act and tribal constitution provides for judicial review). *Accord* *Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rptr. 6008, 6012 (Intertribal Ct. App. 1984) (criminal complaint dismissed because tribe had not complied with defendant's right to speedy and public trial protected by Indian Civil Rights Act); *Rosebud Sioux Tribe v. White Hat*, 11 Indian L. Rptr. 6033, 6034 (Intertribal Ct. App. 1983) (failure of tribal court to maintain adequate record of trial is a violation of criminal defendant's right to appeal, judgment vacated as violation of Indian Civil Rights Act); *Crow Creek Tribe v. Baum*, 10 Indian L. Rptr. 6031, 6034 (Intertribal Ct. App. 1983) (judgment of civil contempt reversed, contempt statute violated defendant's right to due process). *Cf.* *Navajo Nation v. Franklin*, 1 Navajo Rptr. 145, 148 (1977) (failure of tribal police to obtain search warrant may result in suppression of evidence under Navajo Bill of Rights); *Dennison v. Tucson Gas & Electric Co.*, 1 Navajo Rptr. 95, 99 (1974) (provisions of Indian Civil Rights Act prohibit tribe's condemnation of land without due process of law). *See generally* *Matter of the Colville Confederated Tribal Jail*, 13 Indian L. Rptr. 6021, 6021 (Colville Tribal Ct. 1986) (tribal court refused to commit prisoners to tribal jail on grounds that jail conditions violate prisoner's rights under Indian Civil Rights Act); *Greger v. Greger*, 11 Indian L. Rptr. 6025, 6026 (Colo. River Tribal Ct. 1984) ("tender age" doctrine violates equal protection provisions of Indian Civil Rights Act).

113. *Chapoose v. Ute Indian Tribe*, 13 Indian L. Rptr. 6023, 6024 (Ute Tribal Ct. 1986) (tribal court has responsibility to review actions of tribal council for compliance with Indian Civil Rights Act).

114. *Garmen v. Ft. Belknap Community Council*, 11 Indian L. Rptr. 6017, 6017 (Fort Belknap Tribal Ct. 1984) (tribal court lacked jurisdiction because tribal council

clearly wrong.¹¹⁵ It flies in the face of numerous statements in *Santa Clara Pueblo v. Martinez*, that the Supreme Court expected tribal forums to enforce the Act because Congress had changed *tribal* law by enacting its provisions:

"It appears that the Committee viewed § 1302 as enforceable only on habeas corpus *and in tribal forums*."¹¹⁶ "... Congress intended only to modify the substance of the law applicable to Indian tribes" ¹¹⁷ "Tribal forums are available to vindicate rights created by the Act, and § 1302 has the substantial and intended effect of *changing the law which these forums are obliged to apply*."¹¹⁸

Generally, the Indian courts have accepted the provisions of the Act as binding on them,¹¹⁹ and will protect the civil rights of persons affected by tribal actions under the Indian Civil Rights Act or tribal law.¹²⁰

In order to effectively represent an individual plaintiff with a claim for violation of civil rights against a tribal agency or official in an Indian court, a non-Indian lawyer must learn about the tribal culture, customs, and law that are the basis of the tribal concept of civil rights. This is especially important when the client is an Indian. The Indian client usually wants

did not expressly waive sovereign immunity to allow suit under Indian Civil Rights Act).

115. *Halona v. MacDonald*, 1 Navajo Rptr. 189, 204, 1 Tribal Ct. Rptr. A-70, A-71 (1978) (judicial review of Council by tribal courts mandated by Indian Civil Rights Act). *Cf. Nez v. Bradley*, 3 Navajo Rptr. 126, 130 (1982) (district courts of Navajo Nation have power to enforce Indian Civil Rights Act).

116. 436 U.S. 49, 70 n.28 (1978).

117. *Id.* at 70 n.27.

118. *Id.* at 65. *See also* *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 211-12 (1978) (tribes do not have inherent jurisdiction to try non-Indians).

119. *Ute Mountain Ute Tribe v. Mills*, 10 Indian L. Rptr. 6047, 6048 (Ute. Ct. App. 1981) (restitution requirement in sentence did not violate limitations on punishment set out in the Indian Civil Rights Act). *Cf. United States v. McGahuey*, 10 Indian L. Rptr. 6051, 6052 (Hoopa Ct. Indian Offenses 1983) (Indian Civil Rights Act protects right to jury trial in criminal tribal proceedings).

120. *In re L.L.H.*, 10 Indian L. Rptr. 6043, 6044 (Intertribal Ct. App. 1982) (failure of tribal court to decide dependence or neglect of child and failure to issue written opinion violates due process and equal protection under tribal law). *Accord* *Heredia v. Heredia*, 4 Navajo. Rptr. 124, 128 (1983) (due process clause of Indian Civil Rights Act and Navajo Bill of Rights guarantees the right of all debtors to hearing). *See also* *Keeswood v. Navajo Tribe and Navajo Division of Public Safety*, 1 Navajo Rptr. 362, 368 (D. Shiprock 1978) (Navajo tradition of free speech and provisions of the Indian Civil Rights Act prevent tribal court enforcement of vague and unpublished statute restricting assembly); *Navajo Nation v. Lee*, 4 Navajo Rptr. 185, 186 (D. Window Rock 1983) (Indian Civil Rights Act and Navajo Bill of Rights require criminal complaint to be clear and certain).

to remain an effective and respected part of reservation society, whether his lawsuit is won or lost, and this result may be compromised if the goal of the lawsuit is not somewhat consistent with the tribal understanding of personal rights.

Just as American concepts of fairness and civil rights are a product of a unique history and culture, so too are American Indian concepts derived from a unique history and culture. The differences between the two cultures sometimes result in variances in the answers given to the same question. The Indian civil rights advocate cannot assume that an argument neatly reasoned from the federal cases will prevail in an Indian court, or more importantly, that winning a judgment based on concepts of civil rights not accepted by the Indian community will solve the problems of a client or a community.¹²¹ A stiff money judgment or injunction may not resolve the issue where the tribal culture puts little value in either. Simply put, Indian judges and juries respond more readily to concepts and solutions that they can agree will work to solve a problem within the reservation society.

Although the federal courts have construed some of the provisions of the Indian Civil Rights Act to be substantially similar in content to protection afforded by the Constitution,¹²² those same courts have consistently maintained that the special culture, history and sovereignty of tribal Indians and their governments play roles in interpreting the Act.¹²³ This dichotomy in the cases suggests the tension between an assumption

121. See, e.g., *Othole v. Wesley and the Zuni Tribal Police Department*, 4 CLEARINGHOUSE REVIEW No. 5 at 492 (Zuni Tribal Ct. June 6, 1980) (Teenaged girl, wearing pajamas when arrested, was incarcerated overnight in a padded cell with an intoxicated adult male prisoner. Charges against her were dismissed. A small money judgment was obtained, the officer responsible was required to publish a public apology, and the tribal police agreed to undergo training in arrest, search, seizure, and civil rights).

122. *United States v. Lester*, 647 F.2d 869, 872 (8th Cir. 1981) (search and seizure issue considered under fifth amendment standards); *United States v. Clifford*, 664 F.2d 1090, 1092 (9th Cir. 1981) (fifth amendment protections govern arrests by Indian officials on reservation).

123. *Necklace v. Tribal Court*, 554 F.2d 845, 846 (8th Cir. 1977) (Indian not required to exhaust tribal remedies before habeas corpus action). See also *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976) (tribal courts not required to appoint counsel in criminal actions); *Wounded Head v. Oglala Sioux Tribe*, 507 F.2d 1079, 1083 (8th Cir. 1975) (twenty-sixth amendment not applicable to tribal elections); *Yellow Bird v. Oglala Sioux Tribe*, 380 F. Supp. 438, 440-41 (D.S.D. 1974) (membership provisions of tribal constitution not subject to fourteenth amendment equal protection); *McCurdy v. Steele*, 353 F. Supp. 629, 633 (D. Utah 1973) (plaintiffs sought official recognition as governing business council of tribes).

that the Bill of Rights of the United States Constitution is good for all societies and, where possible, should be imposed; and the concept of Indian self-determination. Indian self-determination, as articulated by Congress in the Indian Self-determination Act,¹²⁴ by the executive branch in President Ronald Reagan's policy statement on Indian affairs,¹²⁵ and by the United States Supreme Court¹²⁶ forms the basic foundation for the continued existence of culturally separate, cohesive, Indian societies in the United States.

The unreflective, total imposition of federal Bill of Rights standards on Indian societies by the federal courts created numerous problems for the Indian courts. Some federal judges, for example, decided that because Indian tribes had adopted election methods that appeared similar to those utilized by states, concepts of electoral fairness imposed by the Supreme Court on the states¹²⁷ should apply to tribal elections.¹²⁸ It is true that many tribes have integrated elections, secret ballots, and voter registration into their schemes for selecting representative leadership. These concepts are, however, often blended into an Indian way of government that is designed to meet unique needs about which non-Indian political societies are not concerned.¹²⁹

124. 25 USC § 450 (1975).

125. "This administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments . . . to resume control over their own affairs.", President Ronald Reagan, Presidential Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (January 24, 1983).

126. *Williams v. Lee*, 358 U.S. 217, 220 (1959) (tribal Indians have the right to make their own laws and be ruled by them).

127. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (state statute which effected an apportionment deprived plaintiff of equal protection and was unjustifiable).

128. See *Means v. Wilson*, 522 F.2d 833, 841 (8th Cir. 1975) (civil rights complaint arising from election dispute); See also *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976) (refusal by tribe to declare plaintiffs as eligible candidates because of residency requirements was not violation of rights); *Daly v. United States*, 483 F.2d 700, 704-05 (8th Cir. 1973) (class action suit claimed tribal council was malapportioned thus denying equal protection); *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (action to enjoin election and require reapportionment).

129. *Yazzie v. Navajo Board of Election Supervisors*, 1 Navajo Rptr. 213, 217 (1978);

"The reapportionment plan adopted by the council may have satisfied minimum federal requirements but in no way did it satisfy the unique requirements of the Navajo electorate.

Any plan adopted for the Navajo Nation must take into account chapter boundaries, agency boundaries, district grazing boundaries and other geographic symbols of the traditional clan relationship of the Navajo people.

To do otherwise is to impose alien concepts on the Navajo people in total disregard of their proud, historic and unique character." *Id.*

For example, many Indian "nations" and "confederated" tribal groups consist of several, once independent, sovereign tribes and bands with different histories, customs, religions, territories, and languages. Historically required by military force or federal demands to reside together on one reservation under a single constitution or tribal organization,¹³⁰ the governments of such Indian tribes are more readily compared to a confederation or union of separate states under a federal constitution, than to the citizens of a city under a charter or a state under a constitution.

The individual tribes and bands located on one reservation may have settled, and continued to inhabit specific sections of the reservation. They may also keep some separate customs and traditions. Block voting during tribal elections to maintain representation of bands, clans, or religious societies on the tribal council is common. Many such amalgamated tribal governments try to preserve band and clan identity by permitting registration of members in any electoral district regardless of domicile, providing for voting by tribal members living in certain districts outside the reservation, or allowing voting by members wherever they live; in all of these, membership, not domicile, is the criterion for voting.¹³¹ The imposition of American concepts of voting rights may hinder the realization of specific and legitimate goals of Indian societies.

Suits brought to attack the electoral and other governmental processes of the tribes posed a quandary for Indian courts

Cf. *Halona v. MacDonald*, 1 Navajo Rptr. 189, 211, 1 Tribal Ct. Rptr. A-70, A-80 (1978) ("The final issue is whether the expenditure [of tribal funds] was for a public or private purpose . . . we cannot adequately explain our ruling on this point in English . . . we have chosen to announce this part of our decision from the bench in Navajo.").

130. *See* C. TRAFZER, INDIANS, SUPERINTENDENTS AND COUNCILS, NORTHWESTERN INDIAN POLICY 1850-1855 (1986).

131. The Confederated Tribes of the Colville Reservation, Washington, consisting of numerous separate bands and tribes, is a good example of this situation. All adult Colvilles, wherever they reside, may vote in tribal elections. Residence on the reservation is not required. Adult members may register to vote in any tribal district and are not limited to the district of domicile. This permits band and family allegiances to remain intact by allowing members to vote in the district where their tribe or band resides notwithstanding their actual residence. COLVILLE TRIBAL ELECTION ORDINANCE §§ 5.2, 5.3 (1980). *Accord* *Halona v. MacDonald*, 1 Navajo Rptr. at 195, 1 Tribal Ct. Rptr. at A-74 ("By custom, Navajos are allowed to register and vote in the area where they are from, rather than where they live."). *See also* Solicitor's Opinion M-36141, II Op. Solicitor Dept. Interior 1582 (1952) (a large minority of tribes do not require voters to reside on reservations). *Cf.* CONSTITUTION AND BYLAWS OF THE QUINULT INDIAN NATION (1975) (provides for voting by members residing in designated districts outside the reservation).

in the era when the federal courts exercised broad jurisdiction over reservation affairs through the provisions of the Indian Civil Rights Act.¹³² The normal struggle for political advantage that exists in all societies became confused on the reservation because sudden federal court intervention appeared to place the government of the reservation in the federal courthouse rather than the tribal council chamber.¹³³ Tribal law, custom, and tradition, which had governed in the past, now confronted the apparently stronger non-Indian concepts of electoral process and civil rights. The Indian courts had to contend with the foreign concepts in which the federal Bill of Rights and the Indian Civil Rights Act are rooted. Tribal judges were forced to make an unacceptable choice. If they chose the Indian way, their decisions were denigrated and reversed by the federal courts.¹³⁴ If they chose to strictly apply federal law, they were knowingly destroying their own culture and tradition.

It is not surprising that the Indian courts before *Santa Clara Pueblo v. Martinez* had little to say about the Indian Civil Rights Act. In some instances, the federal courts denied Indian judges the opportunity to construe the Act.¹³⁵ When, however, the Supreme Court in *Santa Clara Pueblo* decided that the interpretation and implementation of the Act was to be left to Indian judges, most Indian courts acted appropriately—interpreting the Act to harmonize its provisions with tribal custom and tradition.¹³⁶

132. See *id.*

133. One federal district court virtually took over the tribal election process, deciding which tribal traditions comported with the court's interpretation of the Indian Civil Rights Act. See *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973); Johnson & Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

134. See, e.g., *Takes Gun v. Crow Tribe of Indians*, 448 F. Supp. 122 (D. Mont. 1978) (Federal district court refused to allow the Crow Court of Indian Offenses to interpret its own jurisdictional statute and took opportunity to criticize Blackfeet Tribal Court for completely unrelated decision).

135. See, e.g., *Howlett v. Salish and Kootenai Tribes*, 529 F.2d at 240 (Federal court relied in part on an offhand, out of court telephone conversation between a tribal judge and an attorney for a party to determine that the tribal court could offer no remedy to a plaintiff suing under the Indian Civil Rights Act. On the strength of the tribal judge's statement, the court refused to allow formal presentation of the issues to the tribal court).

136. See, e.g., *Yazzie v. Navajo Tribal Board of Election Supervisors*, 1 Navajo Rptr. at 215 ("Judicial review of Council actions is, in our view, mandated by 25 U.S.C. 1302(8) as well as by Navajo tradition and custom."). See also *supra* notes 110-113, 120, 129.

C. *Juries and the Right to Representation*

Tribal courts are required under the Indian Civil Rights Act to provide juries in criminal trials and inform defendants of their rights to a jury trial.¹³⁷ On the other hand, decisions regarding the right to jury trial in civil matters are left to the tribes and the civil procedure section of the tribal code should be consulted. The majority of Indian courts permit juries in most civil cases and code provisions establishing six-person juries are standard. Juries are likely to be chosen from the tribal membership roll, but a large and growing number of Indian courts draw juries from the residents of the reservation, thereby including non-Indian jurors on the panel.¹³⁸ The practice of striking juries without *voir dire* by counsel, common in the past, has given way to full *voir dire*, peremptory challenges, and challenges for cause.

Under the Indian Civil Rights Act, the Indian court must allow parties and defendants to have counsel of their choice, so long as the counsel selected is a member of the tribal bar.¹³⁹ Many tribes provide free or low-fee public defender advocates in criminal cases through federally and tribally funded legal aid programs. Tribes are not, however, required to supply counsel to indigent defendants.¹⁴⁰

D. *Independence of Indian Courts*

General doctrines of American law applicable to judges are regularly applied to Indian judges.¹⁴¹ For instance, Indian judges enjoy judicial immunities similar to other judges in the United States.¹⁴² The Indian judiciary does not always, how-

137. See, e.g., *Red Elk v. Silk*, 10 Indian L. Rptr. 3109, 3110 (1983) (tribal court must inform criminal defendants of right to jury trial). Accord 25 U.S.C. § 1302(10) (1968).

138. Compare QUINALT TRIBAL CODE § 30.11(b) (1973) ("a jury shall consist of six persons and one alternate . . . from a list of residents of the Quinalt Reservation. . .") with COLVILLE TRIBAL CODE § 1.7.01 (1980) ("Any person who is at least 18 years of age and who has resided on the reservation for at least a year shall be eligible to be a juror.").

139. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1147 (8th Cir. 1973) ("relatively high" license fee imposed by tribe for admission to tribal court bar did not deny counsel to Indian plaintiffs in violation of Indian Civil Rights Act).

140. See, e.g., *Tom v. Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1976) (Constitution of Lummi tribe did not intend to provide defense counsel at tribe expense).

141. See, e.g., *Ramos v. Pyramid Lake Tribal Ct.*, 626 F. Supp. 1582, 1584 (D. Nev. 1986) (doctrine of "*de facto* judge" applied to tribal court).

142. *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976) (Indian judges enjoy judicial immunity). Accord *Curtis v. Navajo Nation Bar Assn.*, 3 Navajo Rptr.

ever, enjoy constitutional independence from other branches of tribal government. The concept of judicial review, while accepted by the Indian courts as within their powers,¹⁴³ can cause the same kinds of inter-branch struggle experienced by the government of the United States in its early years.

Some tribal constitutions, like that of the Quinault Indian Nation,¹⁴⁴ provide for an independent tribal court and formal impeachment as the only remedy for removal of a judge. The organic documents of other tribes are much less clear. Interference in court proceedings by the tribal executive and legislative branches is not unknown. Despite the pressures, Indian courts, in terms of the longevity in office of those occupying the tribal bench,¹⁴⁵ are quite stable. Recently, the courts of the Navajo Nation were impeded in their work by a tribal executive branch unhappy with several of their decisions. That unfortunate period is now over and a strong tribal bench seems to be firmly established.¹⁴⁶

In most respects, the advocate should follow the lead of the federal executive and judicial branches and deal with tribal judicial systems as separate and independent branches of tribal government. Supporting this policy are federal court decisions that require exhaustion of Indian court remedies prior to accepting federal jurisdiction under the Indian Civil Rights Act. The National American Indian Court Judges Association has recently devoted several of its training sessions to discussions of the separation of powers between legislative and judi-

178, 179 (D. Window Rock 1982) (officers of the Navajo courts are immune from suit for conduct arising from their official duties).

143. See *Halona v. MacDonald*, 1 Navajo Rptr. 189, 204, 1 Tribal Ct. Rptr. A-70, A-77 (1978) (Navajo law and custom and federal law mandate judicial review of tribal council actions); see also *Yazzie v. Navajo Tribal Board of Election Supervisors*, 1 Navajo Rptr. 213, 215 (1978) (judicial review of council action mandated by federal law).

144. QUINULT INDIAN NATION CONST., art. V, § 3b See also SISSETON-WHAPETON SIOUX TRIBE REVISED CONST., art. III, § 5.

145. Olney & Getches, *Indian Courts and the Future*, 41 (U.S. Govt. Printing Office, 1978).

146. Ziontz, *After Martinez*, 12 U.C. DAVIS L. REV. 1, 18 (1979) (Navajo judges now receive appointments for life after serving a probationary term of two years or more and receiving a recommendation of permanent appointment from the Judiciary Committee of the Navajo Tribal Council; the recommendation is given only after a comprehensive, public evaluation based on objective standards); see, e.g., NAVAJO TRIB. CODE tit. 2, § 572 (1982); NAVAJO TRIB. CODE tit. 7, §§ 251, 301 (1982). But see *Runs After v. United States*, 12 Indian L. Rptr. 2124 (8th Cir. 1985) (members of Cheyenne River Sioux tribe challenged validity of tribal council resolutions which "forever barred" appellants from holding elected or appointed office).

cial branches, and the Indian courts have started to develop a body of written law on the issue.¹⁴⁷ In the great majority of tribal courts, interference by other branches of tribal government is a constitutional worry rather than a practical problem.

VI. PRACTICE AND PROCEDURE

A. *Exhaustion of Remedies in Indian Courts*

The major intention of the drafters of the Indian Civil Rights Act,¹⁴⁸ was to provide protection for the Indian defendant in criminal prosecutions before the Indian courts.¹⁴⁹ Yet in the ten years between the adoption of the Indian Civil Rights Act and the limitation placed on federal court jurisdiction in *Santa Clara Pueblo*, the overwhelming majority of cases based on the Act dealt with civil, intra-tribal disputes of one sort or another. Plaintiffs with complaints about tribal elections, enrollment, and property rights rushed to the federal courts.¹⁵⁰ Indian courts, perceived by all parties as less powerful than federal institutions, and assumed by the federal courts to be ineffective,¹⁵¹ were not expected to decide the major questions of Indian government. Despite this presumption of ineffectiveness, the federal bench developed the doctrine of "exhaustion of tribal remedies" during this period. Established as a condition precedent to obtaining jurisdiction over a proceeding brought under the Indian Civil Rights Act, exhaustion of tribal remedies did not account for the abilities of tribal institutions to resolve disputes in the Indian context.¹⁵²

The "exhaustion doctrine" began as an attempt to include tribal institutions¹⁵³ in the process of adjudicating disputes

147. See, e.g., *Le Compte v. Jewett*, 12 Indian L. Rptr. 6025, 6026 (Cheyenne River Sioux Ct. App. 1985) ("as a matter of tribal law, we find that the Indian people of the Cheyenne River Indian Reservation intended that the people should have a right to a tribal judicial forum to judicially review actions of the tribal council.").

148. 25 USC §§ 1301-1341 (1976).

149. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 n.1 (1978).

150. See, e.g., *Rosebud Sioux Tribe v. Driving Hawk*, 534 F.2d 98, 101 (8th Cir. 1976) (federal district court lawfully ignored tribal procedures for resolving election disputes and both parties sought relief in federal court, foregoing tribal remedies).

151. *Olney Runs After v. Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1037 (D.S.D. 1977) (district court allowed Indian Civil Rights Act plaintiffs to ignore appellate procedure in tribal court and proceed with action in federal court).

152. *St. Marks v. Chippewa Creek Tribe*, 545 F.2d 1188, 1189-90 (9th Cir. 1976) (plaintiff dissatisfied with tribal court ruling, and federal forum made available).

153. *Janis v. Wilson*, 521 F.2d 724, 726-27 (8th Cir. 1975) (exhaustion of tribal remedies required prior to assertion of federal jurisdiction over Indian Civil Rights Act claims).

under the Indian Civil Rights Act. But it soon evolved into a paternalistic nod by the federal courts in the direction of Indian customs and traditions prior to making the decision for the tribe.¹⁵⁴ Issues that the *Santa Clara Pueblo* Court later said were better left to "tribal forums",¹⁵⁵ were sometimes handled in a rather insensitive fashion by federal judges.¹⁵⁶

The decision in *Santa Clara Pueblo* significantly reduced the role of the federal courts in reviewing tribal decisions, and for a time, little was heard of the exhaustion doctrine. Most federal courts simply threw out civil actions arising on the reservation.¹⁵⁷ The doctrine has survived, however, in two contexts. First, federal courts apply it whenever a writ of habeas corpus is sought that results from the detention of a person by an Indian court.¹⁵⁸ In this context, the federal courts continue to be unable to resist the temptation to make only a slight bow toward the exhaustion doctrine before going to the merits of the problem.¹⁵⁹

Second, after the decision in *National Farmers Union Insurance Company v. Crow Tribe of Indians*, the exhaustion of tribal remedies doctrine has reappeared in the civil context. Federal courts, directed by the Supreme Court to defer to Indian court decisions regarding tribal jurisdiction in civil

154. *Takes Gun v. Crow Tribe of Indians*, 448 F. Supp. 1222, 1225 (D. Mont. 1978) (federal court ruled that tribal court lacked jurisdiction); see also *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 240 (9th Cir. 1976) (federal court ruled that out of court statements made by tribal judge rendered tribal remedies futile); *United States ex rel Cobell v. Cobell*, 503 F.2d 790, 794 (9th Cir. 1974) (tribal court lacked jurisdiction once federal habeas corpus relief was requested).

155. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 71.

156. See *supra* notes 128, 133-135, 150-154. See also *infra* note 161.

157. See, e.g., *Boe v. Ft. Belknap Indian Community*, 642 F.2d 276, 279 (9th Cir. 1981) (federal courts retain right, pursuant to the Indian Civil Rights Act, to review by habeas corpus tribal orders that require detention of persons).

158. *Necklace v. Tribal Court*, 554 F.2d 845, 846 (8th Cir. 1977) (unless tribal remedies contain no formal habeas corpus procedure, litigants must exhaust tribal remedies before seeking federal jurisdiction).

159. *Ramos v. Pyramid Lake Tribal Court*, 621 F. Supp. 967, 969-70 (D. Nev. 1985) (defendant failed to timely pay the filing fee for appeal to tribal court, so an attempt to exhaust his tribal remedies would be futile). But see *Smith v. Confederated Tribes of the Warm Springs Reservation*, 783 F.2d 1409, 1412 (9th Cir. 1986) (federal courts will generally defer to tribal court in habeas corpus proceeding); *Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976); (a deliberate bypass of tribal remedies does not provide a basis to claim that tribal remedies are futile or exhausted). The fact that the *Ramos* Court found that the petitioner had exhausted his tribal remedies, when he had simply ignored them, can be attributed to the oft remarked tendency of the federal courts in *habeas corpus* actions to move to the merits prior to considering a difficult jurisdictional question. See 16 Fed. Proc. L. Ed., § 41:258 (1983).

cases, have styled their responses as an "exhaustion" requirement.¹⁶⁰ The role of the federal courts under the rule in *National Farmers Union*, is, however, much more limited than that which prevailed prior to *Santa Clara Pueblo v. Martinez*.

Before 1978, a federal court merely looked to see whether the parties had used, or tried to use, what the federal court believed to be available tribal remedies to settle the matter. If the court believed that all reasonable tribal remedies were exhausted, or that pursuing further tribal remedies was futile, it construed Indian Civil Rights Act jurisdiction broadly and took charge of the issue. Some federal courts developed a view which equated the exhaustion requirement with settlement negotiations.¹⁶¹

National Farmers Union, does not, however reinstate the pre-*Santa Clara Pueblo* exhaustion analysis. Rather, *National Farmers Union*, permits the federal court to decide whether, under certain circumstances, and as a matter of federal law, the tribal court may exercise jurisdiction over a specific person or subject matter. The federal court may make this decision only after the Indian court, including any tribal appellate forum, has decided whether or not it has jurisdiction.¹⁶² Only then may the federal court decide whether, under federal law,¹⁶³ the Indian court has properly ruled on its own

160. See *A & A Concrete v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416-17 (9th Cir. 1986) (non-Indian plaintiff required to exhaust tribal remedies in claim against tribe, subsidiary, and other defendants); *Superior Oil v. United States*, 798 F.2d 1324, 1329 (10th Cir., 1986) (plaintiff seeking declaratory and injunctive relief against tribe for refusal to approve oil and gas lease assignments must exhaust tribal remedies); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457, 1458-59 (D. Nev. 1986) (wrongful death action for death on reservation requires exhaustion of tribal remedies).

161. See, e.g., *St. Marks v. Chippewa Cree Tribe*, 545 F.2d 1188 (9th Cir. 1976) (tribal court ruling on the merits found not binding on federal court).

162. *Iowa Mutual Insurance Co. v. LaPlante*, 107 S. Ct. 971 (1987) (at a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review lower tribal court determinations).

163. Federal courts should, in general, allow tribal courts to interpret tribal law. See *A & A Concrete v. White Mountain Apache Tribe*, 781 F.2d at 1416-17 (civil action involving an Indian and a non-Indian); *Runs After v. United States*, 766 F.2d 347, 352-53 (8th Cir. 1985) (dispute involving questions of interpreting tribal constitution and tribal law was not within jurisdiction of district court); *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983) (district court overstepped the boundaries of its jurisdiction in interpreting a tribal constitution, bylaws, and election dispute); *R.J. Williams v. Fort Belknap Housing Authority*, 719 F.2d 979, 981 (9th Cir. 1983) (tribal court must determine whether contractual dispute is in tribal court's jurisdiction). *Accord Benally v. John*, 4 Navajo Rptr. 39, 40-41 (1983) (Navajo Court has exclusive jurisdiction to decide its jurisdiction over validity of deed in probate proceeding); *Estate of Reed*

jurisdiction.

If the federal court decides as a matter of federal law that the Indian court is without jurisdiction, it may vacate or enjoin the decision of the Indian court. It does not follow, however, from such a decision that the federal court itself obtains jurisdiction over the substance of the case tried in the Indian court.¹⁶⁴ It is conceivable that a federal court could simultaneously find the Indian court's assertion of jurisdiction unlawful and that sufficient federal jurisdiction to proceed to the merits of the dispute is lacking. Whether such a procedure should be designated "exhaustion of tribal remedies" is a matter of semantics. As a practical matter, *National Farmers Union* provides federal courts with the power to review an Indian court's assertion of jurisdiction, but the Supreme Court did not increase a federal court's power to resolve the substance of a dispute in Indian country.

The doctrine of exhaustion of tribal remedies as it was understood by the federal courts prior to *National Farmers Union* remains alive in an opinion by the Tenth Circuit Court of Appeals, *Dry Creek Lodge v. Arapahoe & Shoshone Tribes*.¹⁶⁵ While the Tenth Circuit may now be backing away from its analysis in *Dry Creek*,¹⁶⁶ the opinion has not been overruled. Reliance on *Dry Creek* in an attempt to bring Indian Civil Rights Act claims into federal courts may be, however, unproductive. No court in any circuit has followed the holding in *Dry Creek* to the extent that federal jurisdiction under the Indian Civil Rights Act has been found. The Ninth Circuit has rejected its reasoning.¹⁶⁷

Descheeny, 4 Navajo Rptr. 145, 145 (D. Window Rock 1983) (tribal court has exclusive jurisdiction to determine whether statute of limitations has been waived in probate proceeding). See also *Marriage of Limpy*, — Mont. —, —, 636 P.2d 266, 270 (1981) (in dissolution and custody proceeding, exclusive tribal court jurisdiction recognized as matter of comity); *Gambles Home Center, Inc. v. Red Lake Band of Chippewa Indians*, 10 Indian L. Rptr. 3097, 3098 (D. Minn. 1983) (until tribal process exhausted, federal question lacks ripeness); *Ike v. Dept. of the Interior*, 9 Indian L. Rptr. 3043, 3044 (D. Nev. 1983) (denying injunction pending outcome of intertribal dispute).

164. See, e.g., *Northwest South Dakota Production Credit Assn. v. Smith*, 784 F.2d 323, 325 (8th Cir. 1986) (the reasoning of the Court of Appeals in *Northwest South Dakota* leaves both the federal state courts without jurisdiction. If the tribal court found that it too lacked jurisdiction, no forum would be available).

165. 623 F.2d 682 (10th Cir. 1980).

166. *Ramey Construction v. Apache Tribe*, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (distinguishing *Dry Creek* as to the degree of personal restraint and egregious deprivation of personal rights).

167. *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457, 1458 (D. Nev. 1986).

The Tenth Circuit has described *Dry Creek* as an exception to the rule in *Santa Clara Pueblo*.¹⁶⁸ This exception requires a plaintiff seeking federal jurisdiction under the Indian Civil Rights Act to meet the following test. First, the plaintiff must thoroughly exhaust all possible avenues of resolution within the tribal government. Second, the plaintiff must show that an absolute necessity exists for the assertion of federal jurisdiction and that a great injustice would be done if the federal court does not accept jurisdiction.¹⁶⁹ To further confuse the situation, the Tenth Circuit has exempted whole classes of cases from the *Dry Creek* "exception".¹⁷⁰

B. Appeal and Review

Most tribal codes allow for appeals on the record. Some codes allow for a trial de novo under certain circumstances on granting of an appeal.¹⁷¹ Upon approaching a hearing or trial in an Indian court, a thorough knowledge of the manner in which the court makes its record of the case (usually by tape recording) and the appellate rules is crucial. Time deadlines for filing appeals tend to be short. Under some tribal codes, parties must convince an appellate judge that an appeal is merited before the appeal will be accepted and docketed for hearing. Appellate panels, usually consisting of three judges, are commonly drawn from local tribal judges who did not hear the case, tribal judges from other reservations, and state or municipal trial court judges.

Extensive appellate rules have not been enacted by most tribes. Appellants dealing with a code in which appellate rules are sparse may obtain a more rapid disposition of their appeal by drafting and presenting, for consideration by the court, a proposed order listing time limitations, briefing limitations and

168. *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir., 1984) (civil action against Indian tribe by non-Indians).

169. *See, e.g., Sahmaunt v. Horse*, 593 F. Supp. 162, 165 (W.D. Ok. 1984) (federal jurisdiction absent where dispute was intratribal and there was no showing that tribal remedies were unavailable).

170. *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1981); (constitutional challenge so lacked substance that no legitimate federal question raised). *Accord Learned v. Cheyenne Arapahoe Tribe*, 11 Indian L. Rptr. 3104 (W.D. Okla. 1984) (election dispute not within subject matter jurisdiction of federal court).

171. *See, e.g., QUINULT TRIBAL CODE*, § 30.26 (1973). *Accord Mann v. Navajo Tribe*, 4 Navajo Rptr. 83, 84 (1983) (trial de novo in negligence action before full Navajo Court of Appeals); *Kaytso v. Navajo Nation*, 3 Navajo Rptr. 1, 2 (1980) (the only way the Navajo Court of Appeals may consider a fact issue on appeal is by trial de novo).

schedules, and rules regarding submission of the record. This can be done even though the appellate rules do not require such an order. After review and response by all parties, the appellate court will enter the order as its rules on appeal for that particular case.

Attorneys unfamiliar with Indian law always want to know whether a further appeal is available after an Indian Court of Appeals has issued a decision in a case. Neither federal nor state authorities have jurisdiction to hear appeals from the Indian courts.¹⁷² A tribal court is not an inferior court in the federal judicial system,¹⁷³ and state courts may not directly review tribal decisions.¹⁷⁴ A person detained pursuant to an Indian court order can seek a federal writ of habeas corpus under the Indian Civil Rights Act¹⁷⁵ but federal courts will require the prisoner to first exhaust tribal remedies.¹⁷⁶ Thus, a criminal defendant should appeal or seek a writ in the tribal system before filing in federal court. Many codes contain habeas corpus or all writs provisions which give the tribal

172. *Committee to Save Our Constitution v. United States*, 11 Indian L. Rptr. 3035, 3035 (D.S.D. 1984) (Bureau of Indian Affairs has no authority to review tribal court decisions for jurisdiction or correctness). *See also infra* notes 173, 174. Thus, a federal court should not have the power to remove a case from a tribal court under 28 U.S.C. §§ 1441, 1443 (1976) because removal power is extended only to state courts and is narrowly construed. *See generally* *People of the Territory of Guam v. Landgraf*, 594 F.2d 201 (9th Cir. 1979) (interpretation of "state" does not include Territory of Guam absent specific Congressional expression); 29 Fed. Proc. L. Ed. § 69.1 (1983).

173. *Washburn v. Parker*, 7 F. Supp. 120 (W.D.N.Y. 1934) (federal courts lack jurisdiction over tribal matters unless specifically empowered by law or treaty). *Accord* *United States v. Walking Crow*, 60 F.2d 386, 388 (8th Cir. 1977) (tribal courts are not the creation of federal constitution or statute); *see generally* *State ex rel Flammond v. Flammond*, — Mont. —, 621 P.2d 471 (1980) (there is no appeal from a tribal court to the federal court system).

174. *See, e.g., White v. Califano*, 437 F. Supp. 543, 550-51, (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978) (a state court has no jurisdiction to grant de novo review to tribal court proceedings nor may a tribal court independently transfer a matter over which it has exclusive jurisdiction).

175. 25 USC § 1303 (1976). *See Settler v. Yakima Tribal Court*, 419 F.2d 486, 487-88 (9th Cir. 1969) (defendant, who was convicted by a tribal court for violation of tribal fishing regulations, was granted habeas corpus review by federal court). *See also* *Colliflower v. Garland*, 342 F.2d 369, 371 (9th Cir. 1965) (federal court has jurisdiction to issue a writ of habeas corpus to determine the validity of detention of an Indian committed by a tribal court).

176. *Ramos v. Pyramid Lake Tribal Court*, 621 F. Supp. 967, 969-70 (D. Nev. 1985). *See also* *Necklace v. Tribal Court of Three Affiliated Tribes*, 554 F.2d 845 (8th Cir. 1977). *See generally* *Ides v. Martin*, No. C85-114R, 12 Indian L. Rptr. 3015 (W.D. Wash., February 25, 1985); *Springer v. Woods*, No. 83-306D, 12 Indian L. Rptr. 3106 (D.S.D. September 24, 1984).

court the power to grant such a writ.¹⁷⁷

It is unclear at this time whether federal petitions for a writ by tribal prisoners will be treated by the federal courts in the same way that habeas petitions from state prisoners are treated. A federal court reviewing the merits of a petition from a state prisoner utilizes the federal constitution as a standard. In reviewing a tribal proceeding, the court's inquiry is limited to the provisions of the Indian Civil Rights Act, the intentions of Congress in adopting the Act, and the specific history and culture of the tribe whose actions are being reviewed.¹⁷⁸ The difference in the origins of the standards applicable to review of a petition is an insufficient reason to cause the federal courts to use a standard for review of tribal court proceedings that places a higher burden upon them than that borne by the state courts in similar proceedings. Nothing in the Indian Civil Rights Act gives any indication that the tribal courts were to be held to a higher standard than the courts of the states.¹⁷⁹

If it is believed that the Indian court has acted beyond the scope of the tribe's jurisdiction, federal courts may review the acts of Indian judges to determine the limits of their jurisdiction.¹⁸⁰ However, failure to raise an issue which could have been raised in the tribal court proceeding precludes a party from raising it in a subsequent or collateral federal action.¹⁸¹ If the tribal court has jurisdiction, questions involving the merits are left to the tribal system and review elsewhere is generally thought to be unavailable.¹⁸² There is no recorded instance of a writ of certiorari being brought to the Supreme Court from a

177. *Waters v. Dick*, No. C-86-135-RJM, 13 Indian L. Rptr. 3088 (E.D. Wash. May 10, 1986). *Accord* COLVILLE TRIBAL CODE § 2.7 (1980); 28 U.S.C. § 1651 (1976). *See generally* *Price v. Johnston*, 334 U.S. 266 (1947).

178. *Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976).

179. *See generally* *Weatherwax ex rel Carlson v. Fairbanks*, 619 F. Supp. 294 (D. Mont. 1985) (federal courts have traditionally refused to utilize habeas corpus relief in child custody matters).

180. *National Farmers Union Insurance Co., v. Crow Tribe of Indians*, 471 U.S. 845, 847 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 107 S. Ct. 971 (1987). *See also* *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) (tribal court enforcement of tribal taxes levied against non-Indians). *See generally* *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983) (tribal court enforcement of fishing, hunting, and trapping regulations against non-Indians); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) (tribal court enforcement of health regulations against non-Indian businesses located within reservation).

181. *A & A Concrete v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986).

182. *See supra* notes 153-64 and accompanying text.

tribal appellate decision. It is, therefore, unknown how such a writ would be treated.

C. Enforcement of Judgments and Orders of the Indian Courts

The orders and judgments of Indian courts acting with jurisdiction will generally be honored in state and federal courts.¹⁸³ The granting of full faith and credit or comity by an Indian court to another Indian court or a state court order is done regularly,¹⁸⁴ although that the Indian courts are not required by law to do so.¹⁸⁵

State courts are usually unfamiliar with Indian court orders, but most states whose appellate courts have considered the issue have found that a tribal court order or judgment, entered with proper jurisdiction, is enforceable in a state proceeding.¹⁸⁶ Federal courts have also concluded that tribal court

183. Laurence, *Service of Process and Execution of Judgments in Indian Country*, X AMER. INDIAN L. REV. 257 (1982).

184. *Ben v. Ben*, 4 Navajo Rptr. 74, 75 (1983) (Navajo court recognize foreign judgments and will enforce them under principles of comity). *Accord* *Anderson Petroleum Services, Inc. v. Chucks Energy & Petroleum Co.*, 4 Navajo Rptr. 187 (D. Window Rock 1983) (Navajo courts will enforce state court orders and judgments under principles of comity rather than the full faith and credit clause of the U.S. Constitution). *Cf. Matter of the Custody of B.N.P., B.P., L.P., Jr., Minor Children*, 4 Navajo Rptr. 155, 156 (D. Window Rock 1983) (Navajo courts will recognize and enforce judgments and decrees of other Indian courts "where (1) the other Indian court has jurisdiction, (2) the proceedings there were proper and (3) it is within the public policy of the Navajo Nation . . .").

185. *Id.*

186. As to the enforceability of Indian Court judgments in state courts, *compare* *Jim v. C.I.T. Corp.*, 87 N.M. 362, 533 P.2d 751 (1975) (tribal laws entitled to full faith and credit); *In re Doe*, 89 N.M. 606, 555 P.2d 906, (Ct. App. 1976) (Navajo customary law granted full faith and credit in state courts); *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976) (tribal court orders entitled to full faith and credit) *with* *Leon v. Numkena*, 142 Ariz. 307, 689 P.2d 566 (App. 1984) (Indian court judgments would be recognized under principle of comity); *Sheppard v. Sheppard*, 104 Idaho 1, 655 P.2d 895 (1982) (tribal judgments entitled to full faith and credit); *Wippert v. Blackfeet Tribe*, — Mont. —, 654 P.2d 512 (1982) (judgment of Indian courts entitled to comity, with same deference as foreign judgments); *Marriage of Limpy*, — Mont. —, 636 P.2d 266 (1981) (exclusive tribal court jurisdiction recognized as matter of comity); *State ex rel Stewart v. Dist. Ct.*, 187 Mont. 209, 609 P.2d 290 (1980) (tribal domestic relations code provides exclusive jurisdiction to tribal courts, Montana courts defer under principle of comity); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985) (tribal court orders recognized under principle of comity) *and with* *In re Lynch's Estate*, 92 Ariz. 354, 377 P.2d 199 (1962) (proceedings before an Indian court are to be treated as a proceeding of foreign state); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950) (enforcing tribal court judgment although full faith and credit or comity inapplicable); *Wakefield v. Littlelight*, 276 Md. 333, 347 A.2d 228 (1975) (recognizing tribal court actions as binding); *Barrick v. Johnson*, 7 Indian L. Rptr. 4001 (S.D. 1979) (where tribal court has

orders are entitled to comity or full faith credit.¹⁸⁷

In the controversial area of child welfare, where the record indicates that some state courts were unwilling to enforce Indian court judgments regarding children, Congress has mandated full faith and credit.¹⁸⁸ The Navajo courts have concluded that the Bureau of Indian Affairs is required to enforce a tribal court order issued when the order interfered with no federal rights and upheld federal policy.¹⁸⁹ In practice, the standard applied by most state and federal courts to the enforcement of Indian court judgments appears similar to the standard applied to the judgments of a foreign state court, whether the reviewing court labels its procedure as granting full faith and credit, or comity.

D. Insurance

Insurance companies have generally struggled to stay out of the Indian courts,¹⁹⁰ probably because of unwarranted fears of the unknown. However, once tribal jurisdiction is established, insurance companies tend to appear and defend. Where the defendant is an Indian and the activity occurred within Indian country, the insurer may have no choice but to appear in tribal court.¹⁹¹ The major problem with insurance, for the attorney with a claim in an Indian court, is the availability of

exclusive jurisdiction, state agencies must respect and act on tribal court order). *But see* *Malaterre v. Malaterre*, 293 N.W.2d 139, 144 (N.D. 1980) (full faith and credit clause does not apply to Indian tribes); *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 141 (Minn. Ct. App. 1985) (full faith and credit and comity do not require recognition of tribal custom).

187. *Smith v. Confederated Tribes of the Warm Springs Reservation*, 783 F.2d 1409, 1411 (9th Cir. 1986) (comity requires deference to tribal court procedures). *Accord* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 n.21 (1978); *see also* *United States ex rel Mackey v. Cox*, 59 U.S. 100, 103 (1856) (tribal law should be placed on same footing as other "territorial" laws). *See generally* *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold*, 467 U.S. 138 (1986) (denial by state of access to state court for enforcement of Indian court judgments unduly burdensome).

188. 25 USC § 1911(d) (1976). *See* *Navajo Nation v. District Court for Utah County*, 624 F. Supp. 130, 133 (D.Ut. 1985) (Indian child welfare act requires state courts to grant full faith and credit to orders obtained under the act).

189. *Matter of Tsosie*, 3 Navajo Rptr. 182, 185 (D. Chinle 1981) (Bureau of Indian Affairs should enforce a Navajo writ of wage garnishment for child support since it implements both the tribal and the federal statute).

190. *National Farmers Union Insurance Co. v. Crow Tribes of Indians*, 471 U.S. 845, 847 (1985). *See generally* *Swift Transportation Co. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated as moot*, 574 F. Supp. 710 (1983).

191. *See generally* *Williams v. Lee*, 359 U.S. 217 (1959).

insurance payments for injuries caused by the tribe, its agencies, and enterprises.

These problems arise because much of the governmental and business activity on Indian reservations is tribal. Tribal governments own and operate everything from mines and sewer systems to air transport services and religious shrines. Therefore, when someone is injured by a tribal activity the remedies are generally limited to tribal forums.¹⁹²

When tribes contract with the United States to provide governmental services on the reservation, they are required by federal statutes¹⁹³ and regulations¹⁹⁴ to obtain liability insurance to compensate those injured by their activities. Of equal importance is the fact that these regulations require the insurer to waive the tribal right to a defense of tribal sovereign immunity, at least to the limits of the policy. However, if the regulation requiring waiver is not followed, it is unclear whether a remedy is available to an injured claimant. Thus, the problem with insurance is usually not the failure to obtain insurance but the failure by the Bureau of Indian Affairs or the tribe to make sure that the insurer cannot raise the tribal defense of immunity when a claim is filed.¹⁹⁵ The mere obtaining of insurance coverage by a tribe does not waive the defense of sovereign immunity.¹⁹⁶ Without such a waiver, the insurance may be worthless to everyone except the insurer who received the premium. The first thing that an attorney representing a client with a potential claim against a tribal entity should do is review any available insurance policy to determine whether a waiver exists. If no express waiver exists, the immunity defense will not be overcome simply

192. *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 671 (8th Cir. 1986).

193. 25 USC §§ 450f(c), 450g(c) (1976).

194. 25 C.F.R. §§ 271.45, 274.39 (1985); *see also* 48 CFR § P.H.S. 352.280-4(a), (f) (1986); 48 C.F.R. § P.H.S. 352.280-4(a)(21) (1986) (cost reimbursement contract clauses); 352.280-4 (fixed price contract clauses) 25(b)(4) & (f) (1986) § .

195. *But see* *Smith Plumbing Co., v. Aetna Casualty & Surety Co.*, — Ariz. —, —, 13 Indian L. Rptr. 5055, 5056-57 (1986) (state court may adjudicate dispute arising from surety bond where tribal involvement is minimal).

196. *Atkinson v. Haldane*, 569 P.2d 151, 169 (Alaska 1977) (purchase of insurance does not waive tribal sovereign immunity). *Accord* *Graves v. White Mountain Apache Tribe*, 117 Ariz. 32, 35, 570 P.2d 803, 805 (1977) (purchase of insurance does not strip tribe of sovereign immunity); *Tome v. Navajo Nation*, 4 Navajo Rptr. 159, 160 (D. Window Rock 1983) (insurance coverage of tribal government is a liability issue and does not waive sovereign immunity).

because the tribal activity is commercial in nature,¹⁹⁷ or because the activity occurred outside the reservation.¹⁹⁸

F. Bar Membership

Membership in the bar of the court, or association with someone who is a tribal bar member, is required by most Indian courts before a lawyer can practice there.¹⁹⁹ Indian courts admit persons who have not been admitted to any state or federal bar, generally called "tribal court advocates," to practice.²⁰⁰ The small number of tribal courts which prohibit lawyers from representing clients in proceedings before them is declining and such courts generally do not assert jurisdiction, other than the right to exclude, over non-Indians.

Requirements for admission to the tribal bar usually include familiarity with the tribal constitution, code, and rules of court. A court administrator or clerk will usually have the necessary information and form of petition for admission to practice. An annual fee is sometimes charged for admission and some tribes levy tax on the practice of law within the reservation. Tribal taxes imposed on the practice of law do not deny assistance of counsel.²⁰¹ Such fees and taxes, like state assessments, are deductible from federal income taxes.²⁰²

A few Indian courts now require successful completion of a bar examination prior to the representation of clients in the court. The examination is usually based on the tribal code and constitution. Familiarity with tribal traditions and customary law are required by a few Indian courts. Each new admittee to

197. *Morgan v. Colorado River Tribe*, 103 Ariz. 425, 430, 443 P.2d 421, 424 (1968) (fact that in jury occurred at tribal resort did not affect tribal immunity). *Accord* *Long v. Chemhuevoi Tribe*, 115 Cal. App. 3d 853, 858, 171 Cal. Rptr. 733, 735 (1981), *cert. denied*, 454 U.S. 831 (1982) (tribal sovereign immunity subordinate only to federal government).

198. *North Sea Products v. Clipper Seafoods*, 92 Wash. 2d 236, 237-38, 95 P.2d 938, 939-40 (1979) (immunity extends to garnishment proceedings).

199. *Matter of the Practice of Law In the Courts of the Navajo Nation*, 4 Navajo Rptr. 75, 77 (1983) (Navajo courts will grant Navajo Bar membership to Hopi practitioner since Hopi Courts reciprocate).

200. *LaFloe v. Smith*, 12 Indian L. Rptr. 6007, 6007 (Fort Peck Ct. App. 1984) (trial record must indicate reason that individual denied admission to tribal bar). *Accord* *Matter of the Practice of William P. Battles*, 10 Indian L. Rptr. 6022, 6023-24 (Navajo Ct. App. 1982) (Navajo Tribal Code allows establishment of qualifications for admission to bar).

201. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1147 (8th Cir. 1973) (taxes imposed on practice of law in tribal court does not deprive criminal defendants of counsel in violation of the Indian Civil Rights Act).

202. 26 C.F.R. § 305 (1985).

the tribal bar will be required to take an oath to uphold the tribal code and constitution. This oath is similar in effect to that taken prior to admission to state and federal courts and does not prevent the admittee from attacking the jurisdiction of the court.

It may be wise, in order to fully represent a client with a case before an Indian court, to discuss the matter with an advocate. These non-lawyer members of the tribal bar are regularly before the court, are well acquainted with its procedures and customs, and are often skilled practitioners able to try cases to the court with great competence. The court can usually produce a list of advocates who frequently appear. Association of a lawyer with tribal court advocate is not uncommon and may be absolutely necessary in the few instances where the tribal code does not allow lawyers or non-members of the tribe to practice in the court.²⁰³

VII. CONCLUSION

In the past decade, advances in the responsibilities and competence of the Indian courts have been rapid and substantial. The decision in *National Farmers Union*, directing litigants in matters arising on the reservation to the Indian courts, can only increase the speed at which these institutions are changing. Major obstacles, however, will have to be overcome before the Indian courts can assume a clear and consistent role in the American scheme of government. One such obstacle is the lack of an active, central appellate system to which the Indian courts and litigants in them can relate.

In 1934, when Commissioner of Indian Affairs John Collier and Associate Solicitor Felix Cohen first proposed the Indian Reorganization Act,²⁰⁴ it contained a plan for a special federal court designed to exercise jurisdiction within Indian country.²⁰⁵ This special court would have acted as an appellate court for the Indian trial courts.²⁰⁶ Collier, through his advocacy for the Pueblo Lands Act²⁰⁷ and the Indian Reorganiza-

203. In the Matter of the Practice of William P. Battles, 10 Indian L. Rptr. at 6023-24 (Navajo Nation at one time prohibited attorneys from practicing in its courts).

204. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1980)).

205. S. Res. 2755, 73d Cong., 2d Sess., 78 CONG. REC. 2440 tit. IV, §§ 3, 4 (1934).

206. *Id.* at § 5.

207. F. COHEN, *supra* note 43, at 390-93.

tion Act²⁰⁸ and Cohen, through his *HANDBOOK OF FEDERAL INDIAN LAW* and other publications, were farsighted, powerful, and central figures in the revitalization of the American Indian nations in the twentieth century. The special court proposed by Collier and Cohen was dropped from the Act, but the spirit in which this proposal was made should cause those who are looking to the future of tribal courts and tribal governments to consider the value of an active appellate body designed to review the decisions of Indian courts.

Today, despite their poverty, the legislative and executive branches of Indian governments have become respected and powerful, often sitting as equals at the tables of government in the United States.²⁰⁹ Bouyed by federal court decisions, the Indian Reorganization Act, the Self-Determination Act, and other statutes and policies that support tribal government, tribal legislative and executive branches have advanced in strength, expertise, and influence.

For various reasons, the Indian courts have lagged behind. Burdened by lack of respect from their fellow judges on the state and federal bench, lack of interest from their own tribal councils, and lack of funds, they have struggled to attain recognition as an equal branch of tribal government.

A central focus of the Indian nations today, as many of the cases cited in this article point out, is the stabilization of tribal governments as legitimate political entities within the American federal system of government, with paramount control over their own territories, treaty rights, and resources. Tribal legislators and executives must understand that such a stabilization of their authority is impossible without a strong, effective, independent and respected Indian court system. Without an effective Indian judiciary, the tribes will always be dependent on foreign, sometimes hostile, state or federal judges to decide crucial questions that arise within the tribal territory.

Lack of appropriations, facilities, and jurisdictional confusion are all important problems which must be faced and resolved by the Indian judiciary if it is to successfully carry out its responsibility to the people on the nation's reservations.

208. *Id.* at 129-33.

209. "Our policy is to reaffirm dealing with Indian tribes on a government to government basis and to pursue the policy of self-government for Indian tribes . . ." President Ronald Reagan's Policy Statement on Indian Affairs, 19 Weekly Comp. Pres. Doc. 98, 99 (January 24, 1983).

However, a central problem faced by the Indian courts in their quest for full legitimacy within the American judiciary, is the lack, in most instances, of a broad based, efficient, and active appellate system.

The establishment of permanent appellate courts could bring a host of benefits to the Indian judiciary including: regular publication of decisions, a framework for administering the activities of trial courts, fiscal efficiency, a place for the active and principled debate of major issues affecting tribal people, and full recognition by other governments of the tribal judiciary as an impartial and independent body. Any unjustified reputation for impermanence and unfairness which may now burden the Indian judiciary is due, in part, to this lack of a cohesive appellate system. An ad hoc appellate court staffed by pro tem judges is a legally adequate and defensible system, but it fails to provide the institutional foundation on which Indian court processes and jurisdiction can best be constructed.

The single federal court envisioned by Collier and Cohen is unnecessary. Models for regional inter-tribal appellate systems based on tribal sovereignty and inter-tribal compacts are already in place in the Dakotas and Pacific Northwest. Moreover, the Navajo Supreme Court's governance over its district trial courts is an example to be followed. The Bureau of Indian Affairs, which advises and assists most tribal governments in funding and operating their courts could have substantial impact on the establishment of such regional appellate courts by encouraging the efficient expenditure of federal funds used for supporting tribal appellate systems.